

SITUATIONAL ANALYSIS OF LEGAL AND POLICY FRAMEWORK FOR INTELLECTUAL PROPERTY RIGHTS IN EAC, SADC AND COMESA

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NOVEMBER 2013

INTRODUCTION

Intellectual property law protects creations of the human intellect. These creations include inventions that qualify for patent protection; literary and artistic works such as books, plays, music and artwork; product names, slogans, logos and packaging; symbols, names, images and designs used in commerce; and trade secrets. Intellectual Property is a critical component in all aspects of human life from culture, biodiversity, health, agriculture, trade and economic development. It is an instrument for socio-economic development. It impacts a country's competitiveness in the global market. Development of technology takes place within the legal framework of intellectual property rights (IPRs). Policy makers, industrialists, entrepreneurs and academics world over are paying greater attention to significance of IP.

There are different categories and subject matter of IPRs: these include patents, industrial designs, utility models, trademarks, copyright, plant breeders' rights, geographical indications and layout topography of integrated circuit. This categorization is not exhaustive and new subject matter are constantly being recognized and protected such as traditional knowledge and expressions of culture and folklore.

Geographical Coverage of the Study

In most regional economic cooperation arrangements, recognition and effective protection of intellectual property rights is one of the objectives. This paper is a case study on the legal framework for protection of IPRs in three regional economic groups namely the East African Community (EAC); the Common Market for East and Central Africa (COMESA) and the Southern Africa Development Cooperation (SADC). The three regional economic groups are hereafter referred to as the tripartite countries. In assessing the framework, the scope of IPR coverage, range of IPR rights and impact and equity of the national regimes in

relation to international IPR agreements shall be examined.¹

The table below gives a geo-political and economic setting of the three regional blocs that are the focus of this study. The geographical size, population and number of member states for each bloc are illustrated as at 2010.

Pillars regional blobs (REC)¹	Area (km²)	Population	GDP (PPP) (\$US)		Member States
			in millions	per capita	
SADC	9,882,959	233,944,179	737,335	3,152	15
EAC	1,817,945	124,858,568	104,239	1,065	5
COMESA	12,873,957	406,102,471	735,599	1,811	20

In terms of geographical coverage, the East Africa Community is made up of 5 partner states. The EAC Partner states are Burundi, Kenya, Rwanda, Tanzania and Uganda. COMESA is made up of 19 member states while SADC has 15 member countries. The COMESA member states are Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. The SADC member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania and Zimbabwe. In the three tripartite regional economic groupings, there is duality of membership; the duality has negligible effect on the findings of the research and recommendations made in this paper.

¹ Kameri Mbote. 2005. Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Kenya, at p. 1

Importance of Regional Cooperation in Intellectual Property

IP is regional and multilateral in nature. In this era of globalization and digitization, the era of individualism, isolationism and Robin Crusoe has no place. Cooperation, integration and engagement are the *modus operandi*. Regional cooperation in intellectual property issues is important to both developing and least developed countries and the rationale is varied.

First, intellectual property assets derive their value when embodied in tradable goods. Goods and services created by the intellectual property system form a distribution market extending beyond national boundaries. Most goods containing trademarks, patented products, music and artistic works do not respect national boundaries. A single country's intellectual property regime cannot deal with IP issues related to cross-border trade. So long as countries engage in trade, intellectual property assets continue to cross national boundaries. This by itself necessitates a system whereby countries adopt mutual recognition and enforcement of their citizens IP rights. Combating piracy and counterfeit is more effective under a regional cooperation system than the national approach.

Second, IP is a trade facilitation tool. Businessmen and other private sector actors who conduct international trade need to be facilitated through provision of an effective and simplified system under which they can apply and register their intellectual property assets. Distribution efficiency for goods and services is markedly hindered as a result of the presence of multiple rules in one market on trademark and patent registration. For this reason, a regional or multilateral trademark or patent registration system is a trade facilitation mechanism. A regional or multilateral system provides common rules and enables unique domestic circumstances to come in terms with each other.

Third, most countries, particularly LDCs have limited national human, infrastructural and administrative capacities. Most LDCs have specific problems including shortage of resources and weak intellectual property infrastructure. By cooperating in a regional framework, pooling of scarce human, institutional and administrative capacities is made possible. A regional framework helps in institution building to serve the development objectives of its member states. Regional cooperation optimizes creation, protection and utilization of intellectual property infrastructure and human resource development.

Fourth, through regional cooperation, the utilitarian goal of harmonization or approximation of laws is easy to attain. Harmonization eliminates duplicity of procedures, searches and also standardizes IP administration systems and enhances integrity of processes and resulting data. A harmonized approach helps in addressing the problems facing the cooperating countries on IP institution building. It provides common purpose and objective by seeking opportunities to strengthen regional cooperation and using intellectual property for promoting national development. A harmonized approach strengthens IP

content development. This improves the institutional and policy framework for modernization of the IP systems and institutions in the cooperating countries.

Fifth, a regional IP system helps in building invaluable networks, partnerships and coordinated synergies on IP issues. Regional cooperation provides a forum for learning and/or exchange of information, sharing experiences and best practices.

Sixth, regionalism provides a forum to discuss IP issues specific and pertinent to the specific geographical area. Regional cooperation on IP makes it easy to formulate sub-regional and bilateral cooperation programs and to help in synthesis of issues of importance to the cooperating countries. It enables these countries to develop a common strategy to articulate, advance and implement IP programs.

Seventh, regionalism portends a solution to some contemporary IP policy challenges. For example, issues of traditional knowledge, access to genetic resources, bio-piracy, climate change as well as IP and public health can effectively be addressed through regional initiatives. The AIDS pandemic and the HINI Flu demonstrate why regional cooperation is crucial. Whereas national initiatives are welcome on these thematic issues, regional approach provides soft law development and direction on state practices. The WTO Decision of 30th August 2003 on TRIPS and Public Health is an example of incorporating regional dimension to address IP public health concerns.

Eighth, regional cooperation enables the discrepancy existing between the IP system and practice in IP offices to be identified and redressed. An IP system cannot function by itself. Continuous effort involving organization, personnel and financial support is required to lead the system until it penetrates into the awareness of individual citizens. This process cannot be achieved in a short span of time and regional or international cooperation in this area is extremely effective.

Ninth, a regional approach to IP promotes a rule-based system with less discretion in administering the IPR system. It is acknowledged that there is usually a gap between system guarantee and actual effectiveness. This gap is narrow in the regional level as compared to national level.

Tenth, issues of technology diffusion and value addition are intertwined with intellectual property. The maturation of industry either through transfer of technology or development of new technology give rise to demand for high value added products and thereby placing the intellectual property system at the centre of the value. To respond to the demand, a country must upgrade itself through strategic use of managing and leveraging the intellectual property system. Such leveraging is easy to attain in a regional cooperation. The envisaged IP cooperation initiatives between the European Union and the ACP countries

under the EPAs framework are a case in point.

Eleventh, a regional approach helps in addressing the IP asset gap that LDCs are experiencing. LDCs are generally not creators or owners of IP assets. There is need for a regional approach to address the dearth in IP asset generation. Challenges posed by the digital gap and Internet era require regional approach. There is a gap between LDC technology and social system or LDC economic reality and legal reality with respect to IP and the digital era. The IP and digital gap cannot be bridged to zero. To bridge the gap, wisdom and concerted effort is required. Given correct and detailed information and the presence of someone willing to accept it, the gap can be made smaller and the capability to bridge it increases. A regional approach lends itself to demand-driven technical assistance.

COMMON FEATURES OF IPRs FRAMEWORK IN TRIPARTITE COUNTRIES

There are certain commonalities in the IPR legal framework of the tripartite states. They all have national legislation that recognize and protect the traditional subject matter of intellectual property rights namely: patents, copyright, trademarks and industrial designs. They protect utility models or petty patents and technovations.

Other subject matters of IPRs protection is less developed among the tripartite countries. Notable in this category is the protection of new plant varieties. The framework for recognition and protection of plant breeders' rights (PBRs) is uneven across the EAC, SADC and COMESA countries. The absence of effective PBRs legal regime is against the backdrop of how important PBRs are to sub-Saharan countries. All member states within the tripartite countries are dependent on agriculture which makes plant varieties and biodiversity important components of their respective economies. It is arguable whether inadequate PBRs regimes impacts negatively to growth and development of the member countries' seed market.

Protection of genetic resources, traditional knowledge, folklore and expressions of culture as subject matter of IP is yet to gain prominence in and among the tripartite countries. Traditional knowledge (TK) is the least developed IPR in all the three regional economic groupings. None of the tripartite states has an effective legal framework for recognition, protection and enforcement of traditional knowledge. Policies on TK protection have been developed in Kenya and South Africa. This is due to the experience where both countries lost important traditional knowledge to western pharmaceuticals companies and this

necessitated formulation of TK policies².

The more recent subject matter of intellectual property protection has received lukewarm recognition in the tripartite states. There is lackadaisical protection of geographical indications, integrated circuits, audio-visual signs and domain names in all tripartite countries. No effective legal framework exists for this subject matter.

Another common feature is that all member countries of EAC, SADC and COMESA are members of the World Intellectual Property Organization (except Eritrea) and have national patent legislation and this underscores the importance of IPR regimes³. Most of the tripartite countries are members of the World Trade Organization⁴ and the TRIPS Agreement (subject to the flexibility provisions) is applicable.⁵ The implication is that the tripartite countries have a common multilateral legal and policy framework for recognition and protection of IPRs. A notable dimension is that all the three regional economic groups have a trade relationship with the European Union (EU) and the trade framework with EU gives recognition to intellectual property rights. At regional level, some tripartite states are members of the African Regional Intellectual Property Organization (ARIPO).

In terms of administration of intellectual property rights, each of the tripartite states has a national industrial property office. Such offices operate as semi-autonomous governmental agencies or are departments within a designated government ministry. The organizational structure, human resource and technical capability of each office vary from country to country.

³ Sikoyo M.G, Nyukuri E and Wakhungu W J. 2006. Intellectual Property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda, at p. 4: "South Africa lost on the bitter *hoodia* plant used over many centuries by the San as a hunger suppressant. In 1996, scientists from the Council for Scientific and Industrial Research (CSIR) isolated P57 as the hunger suppressing chemical from this plant and later patented it. CSIR later licensed a UK-based firm, Phytopharm, to further develop and commercialize the P57 component. Phytopharm then licensed Pfizer to develop and commercialize P57. This has been a source of conflict between the South African San Council and the CSIR" & "Kenya lost on *Maytenus buchananii* plant found in Shimba Hills of Kenya. The US National Cancer Institute (NCI) collected these plants in the 1970s and used the knowledge of the Digo community about the plant to treat cancerous conditions."

⁴ Eritrea is not a member country of WIPO.

⁵ The TRIPS Agreement makes provision for adequate standards and principles concerning availability, scope and use of intellectual property rights. It also stipulates for effective and appropriate means of enforcement of the IPRs taking into account differences in national legal systems. The following subject matter fall within the ambit of the TRIPS Agreement: copyright and related rights: trademarks, geographical indications, industrial designs, patents, layout-designs (topography) of integrated circuits and protection of undisclosed information.

Appendix 1 is a table on availability of national legislation for specific IP subject matter in all the tripartite countries.

ANALYSIS OF IP PROTECTION IN THE EAC

The EAC countries have multilateral, regional and national regimes to facilitate intellectual property recognition, protection and enforcement. The legal framework encapsulated in these regimes is discussed hereunder.

Multilateral Framework for IP Protection in the EAC Countries

The multilateral framework for IP protection in the EAC is founded on the WTO TRIPS Agreement and the WIPO 1883 Paris Convention on Protection of Industrial Property and the 1965 Berne Convention on Literary and Artistic Works.

The TRIPS Agreement establishes minimum multilateral standards on IPR protection. All the EAC partner states are members of the WTO and the provisions of the TRIPS Agreement are applicable to the countries. However, out of the five EAC partner states, Kenya is categorized as developing while the others are Least Developed Countries. The TRIPS obligations are different depending on whether a country is developing or Least Developed. The central provision of the TRIPS Agreement is Article 27 (1) which stipulates that patents shall be available for any inventions whether products or processes in all fields of technology, provided they are new, involve an inventive step and are capable of industrial application. All WTO member states are bound by this particular provision. All the EAC partner states apply the provisions of Article 27 (1) of the TRIPS Agreement as the legal framework for protection of patentable subject matter. Article 28 makes provision for the substantive rights of the patent holder. If the subject matter of a patent is a product, the patent holder has the exclusive right to prevent third parties from making, using, offering for sale, selling or importing the patented product. When the subject matter of the patent is a process, the patent holder has the exclusive right to prevent third parties from using the patented process and making or selling a product obtained directly by that process. Article 33 provides a minimum term for patent protection as twenty years.

Other than patent protection, industrial design protection plays a significant role in product development. Article 25 of TRIPS stipulates that members shall provide for the protection of independently created industrial designs that are new or original. Each member is to ensure that requirements for securing protection for textile designs are not unreasonable. The EAC states do

provide textile design protection in their national legislation for industrial design protection. The term of design protection is a minimum of ten years.

For copyright and related rights, the EAC Partner States as WTO members are expected to comply with the relevant articles of the WIPO 1965 Berne Convention. The EAC Partner States are signatories to the Berne Convention. Copyright protection extends to the mode of expression and not ideas, procedures, methods of operation or mathematical concepts. Computer programs and compilations of data are protected as literary works. Article 12 of TRIPS Agreement provides for the term of copyright protection. Performers, producers of phonograms and broadcasting organizations are also protected.

On trademark protection, Article 15 of TRIPS regulates the minimum international standards for trademark protection. The Article defines protectable trade mark subject matter as any sign or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings.⁶ All the EAC countries have national laws on registration of trade and service marks. The national legislations on trademark protection are in tandem with the minimum standards in the TRIPS Agreement.

Related to trademark protection is the protection of undisclosed information. The TRIPS Agreement in Article 39 requires member states to ensure that there is effective protection against unfair competition. Natural and legal persons should have the possibility of preventing information lawfully within their control from being disclosed to, acquired by or used by others without their consent in a manner contrary to honest commercial practice. Except for Uganda, the EAC states do not have specific statutory legislation on trade secrets. However, the common law doctrines on protection of trade secrets and contracts in restraint of trade provide the legal framework and policy that implements Article 39 of TRIPS in the EAC countries.

Article 23 of TRIPS makes provision for recognition and protection of geographical indications. These are defined as indications which identify a good as originating in the territory of a member state or a region or locality in that territory, where a given

⁶ The owner of a mark has the exclusive right to prevent all third parties not having his consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the mark is registered. Article 18 stipulates that the term of protection shall not be less than seven years.

quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.⁷ All the EAC member states do not have national legislation that effectively recognizes and protects geographical indications.

A subject matter of IPR that has received little recognition and protection in the EAC states is layout-design (topographies) of integrated circuits. Article 35 of TRIPS requires member states to provide protection to the lay-out designs of integrated circuits. None of the EAC partner states has legislation for such protection.

Multilateral Framework for Copyright Protection in the EAC Countries

The Berne Convention provides the multilateral legal framework for copyright protection and related rights in the EAC Partner States.⁸ The TRIPS Agreement in Article 9 stipulates that the provisions of Berne Convention (Articles 1 to 21) are applicable to member countries. The copyright legislation in the individual EAC Partner States conform to the Berne Convention. The national legislation of the EAC partner states on the criteria for protection of literary and artistic work is a replica of Berne Convention. The term of protection, rights conferred and enforcement provisions replicate the Convention.⁹ The Convention confers upon an author moral rights which is the right to claim authorship of the work and to object to any distortion, mutilation or other modification or derogatory action in relation to the work, which would be prejudicial to honor or reputation of the author (Art

⁷ TRIPS Article 22 (1) requires WTO member states to provide the legal means for interested parties to prevent the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good.

⁸ The Convention under Article 2 defines the class of protected works. The Convention offers protection to literary and artistic works which refer to every production in the literary, scientific and artistic domain in whatever mode or form of its expression. These include inter alia; books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

⁹ The term of protection of protected works is provided by the Convention but varies among the different classification of works. Generally, the Convention grants the term of protection for protected works to be the life of the author and fifty years after his death (Art 7(1)). In the case of cinematographic works, the term of protection stands at fifty years from the time the work was made available to the public (Art 7(2)). As regards anonymous and pseudonymous works, the term of protection is similarly fifty years from the time the work was published (Art 7(3)). However, if the author's identity is made public, the term of protection will revert to be the author's life in addition to fifty more years after his death. The term of protection for photographic works is left to the discretion of the Union member countries.

6bis). Such moral rights subsist after the author's death. An author has the right to institute criminal proceedings against any act of infringement of protected works. Infringing copies are liable to seizure in any member country of the Union where the work enjoys protection. Such seizures are governed by the respective member countries' legislations.

Multilateral Framework for Protection of Expressions of Folklore

"Expressions of Folklore" are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community. Only "artistic" heritage is covered in this definition. This means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony) or merely practical traditions as such, separated from possible traditional artistic forms of their expression, do not fall within the scope of the definition of "expressions of folklore." On the other hand, "artistic" heritage is understood in the widest sense of the term and covers any traditional heritage appealing to our aesthetic sense. Verbal expressions, musical expressions, expressions by action and tangible expressions may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore.¹⁰

The TRIPS Agreement requires WTO member states to comply with the provisions of the Berne Convention. The 1967 Stockholm Diplomatic Conference for revision of the Berne Convention made an attempt to introduce copyright protection for folklore also at the international level. As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contain the following provision: "(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of written declaration giving full information concerning the authority thus designated. The Director General at once communicates this declaration to all other countries of the Union."

¹⁰ 1979 WIPO/UNESCO Model Provisions for National Laws on sui generis Protection of Expressions of Folklore against Illicit exploitation and other prejudicial actions.

This article of the Berne Convention, according to the intentions of the revision conference, implies the possibility of granting protection for expressions of folklore. Despite the provision of Article 15 (4), it seems that copyright law may not be right, or certainly the only, means for protecting expressions of folklore. This is because, whereas an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally bear a mark of individual originality. Traditional creations of a community, such as the so-called folk tales, folk music, folk dances, folk designs or patterns, may often not fit into the notion of literary and artistic works. Copyright is author-centric and, in the case of folklore, an author - at least in the way in which the notion of "author" is conceived in the field of copyright - is absent. Because the existing system of copyright protection is not adequate for the protection of folklore, attention has turned to the possibilities of a *sui generis* solution. Attention is now directed towards having a separate and distinct multilateral legal regime for protection of traditional knowledge and expressions of culture and folklore.

Multilateral Framework for Plant Variety Protection in EAC Countries

The multilateral framework for the protection of new plant varieties in the East African Countries is through the WTO TRIPS Agreement. Article 27 of TRIPS requires WTO member states to protect new plant varieties either through patents, plant breeder's rights or an effective *sui generis* system. The International Convention for the Protection of New Plant Varieties (UPOV) is also a multilateral system that the EAC countries can utilize for plant variety protection. The UPOV Convention identifies the criteria for protection, term of protection and defines the substantive rights in varietal protection.¹¹ A plant variety is protected if it is new, clearly distinguishable, homogeneous and stable. To be new, the variety has to be Distinct, Uniform and Stable in all its essential characteristics otherwise known as the DUS criteria. Protection confers upon the variety holder exclusive rights over the production, reproduction (multiplication), conditioning for the purpose of propagation, offering for sale, selling or marketing, exporting, importing and stocking of the variety's propagating or harvesting material. These are what are known as Plant Breeder's Rights. UPOV fixes the protection period as not less than twenty years after registration of the variety. However, for trees and vines, the protection period should not be less than twenty five years (Article 19). UPOV

¹¹ Act of 1991: International Convention for the Protection of New Varieties of Plants of December 2, 1961 as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991

member countries are obliged to formulate enforcement measures that would govern any manner of infringement of the registered plant breeder's rights (Article 33).

Among the five EAC partner states, Kenya is the only member of UPOV. In terms of national legislation, the Kenyan Seed and Plant Varieties Act of 1972 mirror the UPOV (1978) Convention on plant breeder's rights. Tanzania has enacted Plant Variety Protection legislation while Uganda has a Bill on plant variety protection which has been pending since 2010. Rwanda and Burundi have no legal framework for plant variety protection.

Regional Framework for IPR Protection in the EAC Countries

There are various regional instruments on intellectual property protection that are relevant to the East African Community Partner States. These are:

- (a) The Treaty Establishing the East African Community
- (b) The ARIPO Harare Protocol on Protection of Industrial Property
- (c) The ARIPO Banjul Protocol on Trademarks
- (d) The ARIPO Swakopmund Protocol on Traditional Knowledge, Culture and Expressions of Folklore
- (e) The Cotonou Partnership Agreement and
- (f) The EU-EAC Trade Cooperation Framework and
- (g) TRIPARTITE framework between EAC, SADC and COMESA

Article 5 of the Treaty Establishing the EAC, stipulates that the objectives of the Community is to develop policies and programs aimed at widening and deepening cooperation in the Partner States in economic, research and technology as well as legal and judicial affairs. Article 103 (j) of the Treaty, recognizes the fundamental importance of science and technology in economic development and the Partner States undertake to harmonize policies on commercialization of technology and promotion and protection of intellectual property rights. Presently, no intensive endeavor has been made to implement the provisions of Article 103 (j) of the EAC Treaty.

In the ARIPO context, all the 5 East African Community Partner States are members of the African Regional Intellectual Property Organization (ARIPO). The ARIPO Harare protocol and the Implementing Regulations of 2007 govern protection of patents and

industrial design. The Protocol adopts the multilateral criteria for patentability whereby an invention must be new, involve an inventive step and be industrially applicable.¹² A patent registered under ARIPO is valid for a period of twenty years subject to payment of annual fees.¹³ The enforcement of the patent rights is governed by the national patent laws of the designated country.

The legal framework for trademark protection in ARIPO is the Banjul Protocol. Except for Uganda, the EAC partner states are not signatories to Banjul Protocol and the provisions of the Protocol are presently inapplicable. A distinct feature of the Protocol is Rule 2 whereby an application to register a trade mark may not be refused or invalidated on the premise that the registration was not effected in the country of origin as mandated by the Paris Convention (Rule 2). In Rule 3 of the Protocol, where goods or services belonging to different classes under the Nice Classification are forwarded under one application, such an application shall be accepted and registered as one registered mark. The ARIPO Banjul protocol fixes the duration of protection at ten years while the TRIPS Agreement provides for a period of at least seven years.

The EAC partner states have different protection period for trademarks but all are within the range set by TRIPS Agreement. The TRIPS Agreement fixes the term of trademark protection to a minimum of seven years. Kenya, Rwanda and Burundi have a term of ten years renewable while Uganda and Tanzania have seven years renewable. Substantive rights accruing from registration of trademarks are similar across the EAC national legislations

EU-EAC Trade Cooperation Framework Agreement

From 1975, the European Union (EU) has had a trade and economic relationship with the African, Caribbean and Pacific Countries (ACP). This relationship operated within the legal framework of the Lome Conventions and later the Cotonou Partnership Agreement. At the expiry of the Cotonou Partnership Agreement, the trade relationship between the EU and EAC states is now through a Framework Agreement on Trade Cooperation.

¹² Section 10. ARIPO Harare Protocol and the Implementing Regulations, 2007. Retrieved 12 Oct 2012 from http://www.wipo.int/edocs/trtdocs/en/ap006/trt_ap006.pdf

¹³ Ibid, section 11

All the EAC member states are signatories to the COTONOU Partnership Agreement. Article 46 of Cotonou Agreement stipulates that the signatories to the Agreement recognize the need to ensure effective and adequate level of intellectual property protection that is crucial in reducing distortions and impediments to bilateral trade between EU and ACP countries. The parties agree to comply with the WTO TRIPS Agreement and more importantly to accede to international conventions on intellectual property as provided in TRIPS. Cooperation on IPRs is to be through conclusion of bilateral and multi-lateral agreements. In August 2007 the EAC Head of States Summit made the decision that its Partner states would negotiate an Economic Partnership Agreement with the EU. This led to an interim Framework Economic Partnership Agreement (FEPA) with the EU. The interim FEPA between EAC and EC refers to the need for cooperation in the protection of intellectual property rights. FEPA under Article 3 provides that signatories guided by Articles 34 and 35 of the Cotonou Protocol, would engage in negotiations with the aim of concluding a comprehensive EPA on matters that include IPRs. As it stands now, no agreement has been concluded between EAC and EC in relation to IPRs.

NATIONAL FRAMEWORK FOR IP PROTECTION IN THE EAC COUNTRIES

Legal framework for Patent Protection

Patents are the most developed subject matter of IPR protection in the EAC region. All EAC partner states have national legislations and agencies for patent, industrial design and utility model protection.¹⁴ All the partner states have uniform patent legislations that outline the criteria for patentability, term of protection, substantive rights conferred and enforcement mechanisms for patent, industrial design and utility model infringement. In all the partner states, a patent is granted when the invention is new, involves an inventive step and is industrially applicable.¹⁵ In all the EAC countries except Uganda, the term for patent protection is twenty years.¹⁶ In Uganda, the term is fifteen years; however, a Bill to repeal the current patent legislation to amend the protection period to 20 years is underway.

¹⁴ **Kenya;** Industrial Property Act of 2001, **Uganda;** The Patents (Amendment) Act 2002, **Tanzania;** The Patent Act of 1987, **Burundi;** Industrial Designs and Patents Law (1964) & **Rwanda;** [Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property](#)

¹⁵ Ibid: Kenya; section 22-25, Uganda; section 9-12, Burundi; Article 3-7, Rwanda; Article 14-17 & Tanzania; sect 7-11

¹⁶ Ibid: Kenya; section 60, Uganda; section 29, Burundi; Article 62, Rwanda; Article 42 & Tanzania; section 39

The patent legislation of each of the EAC states provides for enforcement mechanisms. A patent holder is entitled to an injunction to restrain infringement of the patent rights. The holder may bring action for damages and compensation against the alleged infringer(s).¹⁷ The national patent legislations of the EAC member states mirror the provisions of the ARIPO Harare Protocol and the TRIPS Agreement. The uniformity of provisions is evident from the criteria for patentability, substantive rights conferred, remedies available for infringement and term of protection.

Legal Framework for Industrial Design Protection

All the EAC partner states have national legislations for protection of industrial designs.¹⁸ Though they are all members of WIPO, none of EAC countries is a signatory to the Hague Treaty for protection of Industrial designs. On the regional front, EAC countries are members of ARIPO and are signatories to the Harare Protocol on Patent and Industrial Designs protection.

All the EAC countries have national industrial design legislations conforming to the TRIPS Agreement.¹⁹ In all the partner states, an industrial design is registrable if it is new and original. A design is considered new if it has never been disclosed anywhere in the world prior to application for registration. The design should not have been anticipated by a prior art.²⁰ The term of protection for registered industrial designs vary across the five EAC countries. In Rwanda, the protection period is fifteen years from the filling date. Renewal can be done for two consecutive periods of five years each subject to payment of the prescribed fee (Article 105). In Burundi, the protection period is five years (Article 211); in Kenya, the term is five years renewal for a maximum of two consecutive periods of five years upon payment of the prescribed fee (Section 88).

Legal Framework for Trademark Protection

¹⁷ Ibid: Kenya; section 54, Uganda; section 26, Burundi; Article 56, Rwanda; Article 39& Tanzania; section 36

¹⁸ **Kenya**; Industrial Property Act of 2001, **Burundi**; Industrial Designs and Patents Law (1964), **Uganda**; [The United Kingdom Designs \(Protection\) Act](#), **Tanzania**; [The Zanzibar Industrial Property Act No. 4 of 2008](#) & **Rwanda**; [Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property](#)

¹⁹ Article 25 of TRIPS stipulates that industrial designs qualify for protection if they are new and original. The design owner has exclusive rights over the registered design and prevents third parties from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes (Article 26). Lastly, the Agreement under Article 26(3) provides that the duration of protection of a registered design is at least ten years.

²⁰ Ibid: Rwanda; Art 89, Burundi; Art 184, Kenya; sect 86

All partner states of the EAC have national legislation for protection of trademarks.²¹ Each of the partner states has a national agency that registers trademarks. In all the countries, a mark or symbol can only be registered as a trademark if it is distinctive, not deceptive, not confusing and not descriptive.²² A proprietor of a registered trademark has exclusive rights over the mark and has a right to prevent third parties from making or using identical or similar mark for goods or services that are identical or similar to those for which the mark has been registered, if such use would lead to confusion in commercial transaction.²³ The national legislations of each partner state make provision for enforcement of the trademark rights and provide remedies for infringement.²⁴

The duration of trademark protection varies across the EAC member States. In Kenya, Rwanda and Burundi, trademarks are protected for 10 years renewable.²⁵ In Tanzania and Uganda, a registered trademark has a term of seven years renewable.

Legal Framework for Copyright Protection

All the EAC partner states have national legislation for copyright protection.²⁶ Copyright exist by virtue of publication through fixation and not registration. However, Kenya through the Kenya Copyright Board (KECOBO) has established a database for

²¹ **Kenya;** Trade Marks Act, Cap 509; **Tanzania;** [The Trade and Service Marks Act, 1986](#), **Uganda;** The Trade Marks Act 2006, **Burundi;** Trademarks Law of 1964 and **Rwanda;** [Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property](#).

²² Ibid: Tanzania; section 16, Rwanda; Article 134, Kenya; section 12, 13 & 14, Uganda; section 13 & 14 & Burundi; Article 288

²³ Ibid: Burundi; Article 311, Tanzania; section 31 & 32, Rwanda; Article 150, Kenya; section 7 & Uganda; section 6

²⁴ The trademark holder can institute judicial proceedings against any party who infringes the mark by using it without their consent or who performs acts likely to constitute infringement.²⁴ Under Kenyan Trademark Act, there are three offences relating to trademarks. False representation of a trademark as registered is an offence under Section 58 of the Act. The same section stipulates that forgery of a registered trademark is a criminal offence. Falsification of entries in the trademark register is an offence according to Section 57 of the Kenyan Trademark Act. Section 57 of the Tanzanian Trademark Act provides that any person who makes a false representation with reference to a mark that is not actually registered is guilty of the offence of false representation and is liable for a jail term of not more than seven years or a fine of up to fifty thousand shillings.

²⁵ Ibid: Burundi; Article 318, Kenya; section 23, Rwanda; Article 153

²⁶ Kenya; Copyright Act of 2001, Tanzania; The Zanzibar Copyright Act, 2003, Uganda; The Copyright Act 2010, Burundi; The Copyright and Related Rights Law of 1978 & Rwanda; Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property.

copyright registration in line with its Copyright Act. Registration is prima facie proof of authorship and the date of publication. The other four EAC states do not have copyright registration system.

The legal framework of all the EAC partner states provides that copyright is available for literary and artistic works.²⁷ Musical works, audio-visual works, sound recordings and broadcasts are eligible for copyright protection.²⁸ Computer programs and data bases are protected by copyright. The criteria for copyright protection and the substantive rights conferred are uniform in the EAC countries.²⁹ Protection is conferred if the author is a national or citizen or an ordinary resident in the country and the work is first published within the country.³⁰ The term of protection varies according to the classification of the work: for literary, musical and artistic works the term is the life of the author and fifty years after his death. For audio-visual works, sound recordings and broadcasts the term is fifty years from the date they were first published or recorded. Where there are two joint authors, the fifty years is counted after the death of the surviving author³¹.

²⁷ This include: books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

²⁸ Ibid: Kenya; section 22, Uganda; section 5, Tanzania; section 5, Burundi; Article 4 & Rwanda; Article 195

²⁹ A copyright holder has the exclusive right to publish, produce or reproduce the work; distribute or make available to the public the original or copies of the work through sale or other means of transfer of ownership; perform the work in public; broadcast the work; communicate the work to the public by wire or wireless means or through any known means or means to be known in the future, including making the work available to the public through the Internet or in such a way that members of the public may access the work from a place and at a time individually chosen by them. Where the work is a pre-existing work, the copyright holder has the exclusive right to make a derivative work; commercially rent or sell the original or copies of the work or do in relation to that work any act known or to be known in the future and lastly reproduce transcription into Braille which is accessible to blind persons. The owner of protected work is also conferred upon moral rights over the works which include inter alia exclusive right to seek relief in connection with any distortion, mutilation, alteration or modification of the work. He has the right to have the author's name or pseudonym mentioned or acknowledged each time the work is used and claim authorship of that work, except where the work is included incidentally or accidentally in reporting current events by means of media or other means.

³⁰ Ibid: Kenya; Section 23(1)& 24,Uganda; Section 3, Tanzania; Section 3, Burundi; Section 59-63

³¹ Ibid: Kenya; Section 23(2), Uganda; Sect 13, Tanzania; section 14, Rwanda; Article 217-219

The copyright legislations of the EAC countries provide enforcement mechanism for infringement of protected works.³² The copyright holder has the right to initiate infringement proceedings and is entitled to civil remedies such as damages, injunctions, delivery of infringing copies, seizure and account for profits.³³ Criminal penalties for infringement are available. In Kenya, infringement is a criminal offence with a fine between four hundred and eight hundred thousand shillings and a possibility of imprisonment (Sect 38 (4-8)). In Uganda, infringement attracts a monetary fine with an option for imprisonment (Article 47). In Tanzania, a fine and a term of imprisonment are provided for (Sect 42). In Burundi, infringement attracts a minimum payable fine between 10,000 and 1,000,000 francs or an imprisonment term of between three months and two years (Burundi; Art 93).

National Regimes for Plant Variety Protection in EAC Countries

The TRIPS Agreement in Article 27 thereof require member states to provide protection for new plant varieties either through plant breeder's rights or an effective *sui generis* system. In the EAC countries, the legal framework for plant variety protection is less developed in comparison to industrial property.

Kenya protects new plant varieties through its Seed and Plant Variety Act of 1972. In Tanzania, the Plant Breeders' Rights Act No. 22 of 2012 is in place. In Uganda, the Plant Variety draft Bill of 2010 was prepared but is yet to become law. Rwanda and Burundi presently have no developed PBRs legislations.

In Kenya and Tanzania, a new plant variety must fulfill three criteria for protection. The variety must be:

- (I) Distinguishable by one or more important morphological, physiological or other characteristics from any other variety whose existence is a matter of common knowledge at the time of the application;
- (II) Uniform or homogenous having regard to the particular features of its sexual reproduction or vegetative propagation and
- (III) Stable in its essential characteristics.

³² Ibid: Uganda; sect 46, Kenya; sect 35(1-3), Tanzania; sect 41(3) & Burundi; Art 94

³³ Ibid: Kenya; sect 38, Tanzania; sect 43(1), Burundi; Art 92 & Rwanda; Art 265

Registration of a plant variety confers upon the breeder an exclusive right to produce the reproductive material of the variety for commercial purposes. The right holder has the exclusive right to commercialize, offer for sale, export and stock the variety. It is an offence for a third party to undertake any of the actions prohibited without the consent of the right holder. The farmer's right to use propagating material for subsistence purposes is not prohibited. Both Kenya and Tanzania recognizes farmer's rights and the farmer's privilege.

Protection of Traditional Knowledge, Culture and Expressions of Folklore in the EAC Countries

Protection of traditional knowledge (TK), culture and expressions of folklore as subject matter of intellectual property rights is undeveloped in the EAC partner States. There is no national legal framework for protection of TK. Except for Kenya, the EAC countries lack coherent policy statement on traditional knowledge, culture and expressions of folklore. The Kenya Constitution 2010 recognizes intellectual property rights and espouses protection of traditional knowledge, culture, indigenous seeds and plant varieties. Article 11 of the Constitution recognizes indigenous culture as the foundation of the nation and its people. The State is tasked with promoting the intellectual property rights of the people of Kenya. As an enforcement mechanism, the Constitution requires Parliament to enact legislation that would ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage. Kenya has in the recent past adopted a TK policy framework that is intended to spearhead development of traditional knowledge. The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions of 2009 seeks to formulate a legislative framework and also establish a national database for registered traditional knowledge rights. None of the EAC Partner States has a national legislation recognizing and protecting traditional knowledge.

In terms of folklore, Rwanda has a specific legislation for protection of folklore. In the other EAC countries, protection of folklore is presently done in the framework of their copyright laws.

INDUSTRIAL PROPERTY STATISTICS IN THE EAC PARTNER STATES

All the East African Community partner states have industrial property registration system. Analysis of registration data reveals the extent to which the legal framework on industrial property is being utilized by residents and no-residents. The statistics below has been categorized in accordance with the subject matter of IP protection.

Patent Applications Statistics in EAC Partner States 1980 – 2010

COUNTRY	ORIGIN	1980-1989	1990-1999	2000-2010	TOTAL	% TOTAL RESIDENT & NON-RESIDENT.
KENYA	Resident	1	17	7	25	2.3
	Non-Resident	903	68	17	988	90.81
UGANDA	Resident	-	-	-	-	0
	Non-Resident	236	28	-	264	100
TANZANIA	Resident	1	-	-	1	0.38
		263	-	-	263	99.62
	Non-Resident					

RWANDA	Resident	1	-	-	1	0.96
	Non-Resident	31	20	53	104	99.04
BURUNDI	Resident	1	2	1	4	6.45
	Non-Resident	29	15	14	58	93.55

Source: WIPO Statistics Database as at December 2011³⁴

Patent statistics of the EAC member countries represent both resident and non-resident filings. Resident applications and registrations refer to those filed by persons or parties domiciled in the jurisdiction of the respective national patent office. Non-resident refers to filings by parties not domiciled within the jurisdiction of the national patent office. The statistics show that non-residents filings dominate resident filings which imply more foreign registration of patents compared to local patents registration. In all the five countries, foreign patents applications have accounted for up to 90% of the total applications. However, it should be noted that though foreign patent applications dominate, except for Rwanda, their numbers have been dwindling consistently for the last thirty years. Statistics for local patent applications paints a grim picture for EAC member

³⁴

Retrieved 25th Sept 2012 from http://www.wipo.int/export/sites/www/ipstats/en/statistics/patents/xls/wipo_pat_grant_from_1883_table.xls

countries. Kenya has a handful of local patents applications and the respective numbers have been on the rise for the last 30 years. The other four EAC countries namely Burundi, Rwanda, Uganda and Tanzania have insignificant number of local applications as their record for the last 30 years stands at less than 5 applications. Insignificant number of local applications suggests that there is little creativity and inventiveness among the citizens of the EAC partner states. The infinitesimal increase in the number of local patents indicates that the level of research and development among the EAC member countries is low. It implies a limited use of the IP legal framework by residents. This may be due to lack of awareness, absence of creativity and inventiveness or the relatively high costs for acquiring and maintaining IPRs in an LDC context.

Trademarks Applications Statistics in EAC Partner States

Compared to patents, trademark applications is active the EAC partner states. A high number of trademark applications have been recorded in the last 30 years. Foreign applications continue to dominate across all the five EAC partner states. Except for Burundi, the number of foreign applications has been on a steady increase across the region. Kenya has more local applicants compared to other countries in the region. In 2000- 2010, local trademark applications in Kenya almost equaled foreign applications. From 2010, there has been increase in local trademark applications across the EAC region. This may be attributed to increased IPR awareness as more citizens are enlightened on the importance of trademarks protection in business enterprises. At the multilateral level, Kenya and Tanzania are signatories to the Madrid agreement and have significant number of foreign trademarks registered under the Agreement. This is more pronounced in Kenya where the total number of trademarks registered under the Madrid agreement for the past decade is almost equal to foreign trademarks registered nationally. The statistics below show trends in trademarks applications in the EAC states.

COUNTRY	ORIGIN	1980-1989	1990-1999	2000-2010	TOTAL	%TOTAL RESIDENT &NON-RESIDENT
KENYA	Direct Resident	3868	836	9788	14492	28.36

	Direct Non- Resident Madrid	5729 -	1639 1734	11906 15599	19274 17333	37.72 33.92
UGANDA	Direct Resident	74	57	-	131	2.12
	Direct Non- Resident	1144	309	4591	6044	97.88
TANZANIA	Direct Resident	149	156	205	510	8.23
	Direct Non- Resident	803	1084	3284	5171	83.47
	Madrid	514	-	-	514	8.3
RWANDA	Direct Resident	93	38	328	459	15.16

	Direct Non- Resident	732	471	1365	2568	84.84
BURUNDI	Direct Resident	30	57	20	107	7.48
	Direct Non- Resident	548	644	132	1324	92.52

Source: WIPO Statistics Database, June 2012³⁵

Industrial Design Applications Statistics in EAC Countries

Statistics for industrial designs registration across the EAC member countries is scarce and in some countries non-existent. Kenya has statistics that reveal more local industrial design applications compared to foreign applications. Rwanda and Burundi have a database with insignificant number of applications recorded for the last 30 years. Uganda and Tanzania do not have verifiable statistical database for industrial design applications and registrations. This is due to the lack of development of an up to date and effective registration database and industrial design office.

³⁵

Retrieved 25th Sept 2012 from
http://www.wipo.int/export/sites/www/ipstats/en/statistics/marks/xls/57_tm_regs_by_office.xls

COUNTRY	ORIGIN	1980-1989	1990-1999	2000-2010	TOTAL	% TOTAL RESIDENT & NON-RESIDENT
KENYA	Direct Resident	-	90	285	375	75.96
	Direct Non-Resident	-	20	86	106	22.04
UGANDA	Direct Resident	-	-	-	-	-
	Direct Non-Resident	-	-	-	-	-
TANZANIA	Direct Resident	-	-	-	-	-

	Direct Non- Resident	-	-	-	-	-
RWANDA	Direct Resident	4	-	-	4	40
	Direct Non- Resident	-	1	5	6	60
BURUNDI	Direct Resident	-	3	1	4	100
	Direct Non- Resident	-	-	-	-	-

Source: WIPO Statistics Database, December 2011³⁶

³⁶

Retrieved 25th Sept 2012 from http://www.wipo.int/export/sites/www/ipstats/en/statistics/designs/xls/87_idesigns_regs_by_office.xls

Plant Breeder's Rights Applications Statistics in EAC Countries

Kenya is the only EAC member state with a plant breeder's rights data base. Foreign applications dominate with a marked distinction between the number of applications and the eventual number of variety registrations. Only a small percentage of the applications are fully registered for varietal protection.

YEAR	ORIGIN	APPLIED	%	REGISTERED	% TOTAL LOCAL & FOREIGN
1980-1989	LOCAL	-	-	-	-
	FOREIGN	-	-	-	-
1990-1999	LOCAL	69	25.09	-	-
	FOREIGN	206	74.91	-	-
2000-2010	LOCAL	323	40.48	7	95.21
	FOREIGN	475	59.52	139	4.79

Copyrights Applications Statistics in EAC Countries

Copyright protection arises by virtue of publication and not registration. Consequently, most countries do not have a copyright registration system. In the EAC region, copyright registration has been done in Kenya since 2007. The registration does not confer protection but is *prima facie* evidence of authorship of the protected work and the date of publication. Registration in Kenya is done through the Kenya Copyright Board (KECOBO). Due to its infancy stage, the KECOBO database does not

distinguish local and foreign registrations. A significant number of copyrights registrations have been recorded for the last five years. Majority of the registered copyrights are local due to increased and aggressive awareness campaign for copyright protection.

COUNTRY	PERIOD	REGISTERING AGENCY	ORIGIN	TOTAL NUMBER REGISTERED
KENYA	2007- 2011	KECOBO	N/A	1794

ANALYSIS OF IP PROTECTION IN COMESA COUNTRIES

The Common Market for Eastern and Southern Africa (COMESA) was established by Treaty in 1994 and has 19 member states. The vision of COMESA is to be a fully integrated and competitive regional economic community. To attain the vision, COMESA has an intellectual property policy to facilitate mainstreaming of IP in all its policies, programs and activities. The goal of the IP policy is to transform COMESA region into a knowledge- based and innovation driven economy.³⁷ The policy focuses on awareness and developmental aspects of IP protection. The policy recommends that audits should be carried out to determine the region's strengths and weaknesses in intellectual property generation and protection.

³⁷ The COMESA policy envisages that member states will promote, encourage and facilitate the generation, innovation, creation, development, use, exploitation, commercialization, and licensing of IPRs as well as effective protection of IPRs. The states will promote and facilitate the mainstreaming of IP into all COMESA policies, structures, systems, programs and activities. The countries will promote and encourage the mainstreaming of IP into the economic, industrial, technological, social and cultural policies, systems, structures, programmes and activities of the COMESA Member States. The countries will build capacity in institutions and human resources required for IP innovation and creativity and enhance the capacity of policy and decision makers to fully appreciate the potential benefits of IP in cultural, social and economic development and play an active role in the unfolding global IP arena.

COMESA IP policy recognizes the interface between IP and international trade. Member states are encouraged to participate in IP negotiations at international, regional or other levels to ensure pro-development outcomes for the COMESA region.³⁸ The COMESA IP policy is thematic and encompasses copyright and related rights; industrial property; cultural industries; traditional knowledge and expressions of folklore as well as IP and information communication technology. Member states are encouraged to audit and assess the contribution of the relevant IP subject matter to the cultural, social and economic development of the country. The States are to take policy and legislative measures to promote and protect IPRs so as to derive maximum benefits. The States are encouraged to collaborate in protection and enforcement of IP, particularly the fight against production, manufacture and trade in counterfeit and infringing goods within the COMESA region. Member states are encouraged to utilize flexibilities provided in IP international treaties and promote harmonization of industrial property legislation within COMESA.

The COMESA policy aims to promote the use of traditional knowledge (TK), genetic resources (GR) and folklore including the recognition of the rights of TK, GR and Folklore holders and actively ensure that holders are duly rewarded. Member states are to secure the protection of TK, GR and Folklore through *sui generis* systems to prevent their misappropriation, misuse, and exploitation and to create systems to govern their protection, promotion and utilization. COMESA countries are encouraged to develop guidelines for access and benefit sharing (ABS); Prior Informed Consent (PIC) and to ensure the acknowledgment and recognition of the sources of TK, GR and Folklore by the users. The policy encourages COMESA members to ratify or accede to and effectively implement international treaties such the Convention on Biodiversity (CBD) and International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) that promote the protection of TK and GR. Some tripartite countries have access and benefit sharing regulations. For instance, Kenya in 2006 enacted the Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations.³⁹ Uganda in 2005 enacted the Guidelines for Accessing Genetic Resources and Benefit Sharing (UG021). South Africa has the 2008 Regulations on Bio-prospecting, Access and Benefit Sharing.

On cultural industries, the COMESA policy seeks to improve and strengthen member states capacities for creating, producing, branding cultural goods and facilitating better access to foreign market. The policy encourages member states to conduct audit

³⁸ The states shall develop an effective IP promotion and protection system within COMESA so as to create incentives for innovation and creativity as well as for foreign direct investment and to promote and encourage joint ventures, alliances or licensing of technology as a way of facilitating technology transfer to COMESA Member States.

³⁹ Government of Kenya, Legal Notice No. 160 of 2006.

of firms involved in creating and marketing of cultural products and services in member states and sector by sector with a view to evaluating the contribution of cultural industries to social and economic development in member states. Member states are encouraged to set up collective management organizations or societies in the copyright and cultural and creative industries; and promote co-operation and collaboration within and outside COMESA on issues regarding cultural and creative industries. Some COMESA and SADC countries such as Kenya⁴⁰, Malawi⁴¹, Tanzania⁴², and South Africa⁴³ have collective management societies. Uganda has the Federation for Movie Industry while the Mauritius Society for Authors is a collective management society.

On electronic economy, COMESA recognizes that digital technology plays a significant role in global trade and dissemination of information. COMESA undertakes to adopt policy and legal measures to promote use of ICT by the business community, micro small and medium enterprises in branding, marketing and selling of goods or services locally and globally. The aim is to mainstream ICT into the cultural, social and economic activities of COMESA member states.

The COMESA IP policy addresses the relationship between IP and public health particularly access to medicine and the HIV-AIDS pandemic and the role of IP in agriculture and food security. Member states are encouraged to devise plant variety systems

⁴⁰ The Collective Management organization in Kenya are the [Music Copyright Society of Kenya \(MCSK\)](#), the [Reproduction Rights Society of Kenya \(KOPIKEN\)](#), the [Kenya Association of Music Producers \(KAMP\)](#) and the [Performers Rights Society of Kenya \(PRISK\)](#).

⁴¹ The Copyright Society of Malawi (COSOMA) is a statutory body established in 1992 to implement the Copyright Act, 1989. As such, it plays the dual role as a copy rights watchdog for its seven rights holder association members, as well as advisor to the Government to ensure that Malawi fulfills its international obligations on copyrights and related rights. COSOMA is also a multidisciplinary collective management organization, mandated to administer collectively the rights of authors, composers, adaptors, performers, producers of sound recordings and broadcasting organizations. The objective is to ensure that the rights of creative people in the literary, artistic, and musical fields are efficiently and effectively promoted. A major activity of the Society is licensing of the use of artistic works in public performance, broadcasting, mechanical and reprography including photocopying, signing of agreements with users, and undertaking anti-piracy campaigns. With regards to documentation and distribution, COSOMA is involved in recruitment and registration of members, monitoring use of works in broadcast programmes and public places, and distribution of royalties to artists.

⁴² Tanzania has COSOTA (Copyright Society of Tanzania) and Kopitan which is a Tanzanian collective management organization in the field of reproduction since 2009.

⁴³ SAMRO [Southern African Music Rights Organisation](#), NORM - National Organization for Reproduction Rights in Music in Southern Africa , [Christian Copyright Licensing International South Africa](#) and Christian Video Licensing International South Africa

that promote the development of seed management taking into account the importance of agriculture in the region. The member states are to promote the recognition of farmer's rights and rights of local communities in conservation, saving and management local varieties.

On technology transfer, the policy encourages COMESA members to promote acquisition and transfer of environmentally sound technologies and to utilize existing resources such as patent information as a useful foundation of updated technological information. Members are also encouraged to take measures that promote technology cooperation and enable transfer of necessary technological know-how.

PATENT STATISTICS OF COMESA MEMBER COUNTRIES (1980 – 2010)

Most of the COMESA countries have national patent legislation. Some of the COMESA countries are members of the EAC while others are members of SADC. The statistics overlap the three regional organizations. In relation to recognition and protection of Layout Designs (Topography) of Integrated Circuits, only Egypt, Mauritius and Zimbabwe among the COMESA countries have specific legislation on the subject.

Registration of patents is fairly prevalent among COMESA member countries. Egypt stands out as having the most number of patent applications within COMESA. Majority of the COMESA member countries have less than five hundred recorded patent applications and grant. In all countries, the numbers of foreign patent applications outnumber local applications. Foreign applications account for more than 85% of the total patents filed for the last 30 years within COMESA. Egypt, Kenya, Sudan, Madagascar and Mozambique are the only countries that have recorded increase in number of local applications for the last two decades. This essentially means that the level of inventiveness among the COMESA member countries is low. This can further be attributed to the low levels of research and development initiatives among the COMESA countries. Failure to record significant local or resident patent is stark reminder of the grim inventive situation within COMESA. The patent statistics from the COMESA member states is as illustrated in the table below.

COUNTRY	ORIGIN	1980-1989	1990-1999	2000-2010	TOTAL	% TOTAL LOCAL & FOREIGN
KENYA	Resident	1	17	7	25	2.3
	Non-Resident	903	68	75	988	90.81
LIBYA	Resident	-	-	-	-	-
	Non-Resident	-	-	-	-	
EGYPT	Resident	75	280	748	1103	11.12
	Non-Resident	2564	2752	3496	8812	88.88
ETHIOPIA	Resident	-	-	-	-	-
	Non-Resident	-	-	64	64	100
SUDAN	Resident	-	82	862	944	97.32
	Non-Resident	-	26	-	26	2.68
UGANDA	Resident	-	-	-	--	0
	Non-Resident	236	28		264	100

ZIMBABWE	Resident	167	73	-	240	7.9
	Non-Resident	2057	713	29	2799	92.1
ZAMBIA	Resident	15	13	-	28	2.58
	Non-Resident	782	246	29	1057	97.42
MADAGASCAR	Resident	-	41	44	85	27.89
	Non-Resident	-	93	297	390	82.11
MALAWI	Resident	2	4	-	6	0.92
	Non-Resident	433	146	66	645	99.08
MAURITIUS	Resident	3	4		7	0.94
	Non-Resident	60	34	13	107	99.06
DRC	Resident	31	-	-	31	6.94
	Non-Resident	416	-	-	416	93.06
SWAZILAND	Resident	-	-	-	-	0
	Non-Resident	87	47	-	134	100
SEYCHELLES	Resident	-	-	-	-	0
	Non-Resident	21	7	-	28	100

MOZAMBIQUE	Resident	-	2	18	20	15.27
	Non-Resident	-	18	93	111	84.73
ERITREA	Resident	-	-	-	-	
	Non-Resident	-	-	-	-	
BURUNDI	Resident	1	2	1	4	6.45
	Non-Resident	29	15	14	58	93.55
RWANDA	Resident	1	-	-	1	0.96
	Non-Resident	31	20	53	104	99.04
DJIBOUTI	Resident	-	-	-	-	
	Non-Resident	-	-	-	-	

TRADEMARK STATISTICS IN COMESA COUNTRIES (1980-2010)

Trademark registration among COMESA countries is well documented compared to other IP subject matter. The statistics paint a picture of more foreign applicants compared to resident applications. However, local applications have been on increase in most COMESA countries. This can be attributed to increased awareness among citizens of the economic importance of trademark protection and the role of trademarks in business environment. Other than the national legal framework, some

COMESA countries are members of the WIPO administered Madrid Agreement and Protocol and thus additional foreign trademark applications are processed through the Madrid system. Egypt, Kenya, Zambia, Madagascar, Lesotho, Swaziland and Mozambique are signatories to the Madrid system. In these countries, there has been a marked increase in the number of trademarks registered under the Madrid system due to the wider scope and jurisdiction of the system. This explains why for the last one decade, there has been more registration of trademarks under the Madrid system within these countries compared to national registrations.

The table below illustrates the trend in trademark registration in the COMESA countries between 1980 and 2010

COUNTRY	ORIGIN	1980-1989	1990-1999	2000-2010	TOTAL	% TOTAL LOCAL & FOREIGN
KENYA	Direct Resident	3868	836	9788	14492	28.36
	Direct Non-Resident	5729	1639	11906	19274	37.72
	Madrid	-	1734	15599	17333	33.92
EGYPT	Direct Resident	501	-	-	501	1.1

	Direct Non-Resident	1761	-	2134	3895	8.49
	Madrid	-	10446	31010	41456	90.41
ETHIOPIA	Direct Resident	168	1707	2005	3880	43.59
	Direct Non-Resident	973	1711	2337	5021	56.41
SUDAN	Direct Resident	231	1522	7746	9499	43.67
	Direct Non-Resident	1458	5787	5006	12251	56.33
UGANDA	Direct Resident	74	57	-	131	2.12
	Direct Non-Resident	1144	309	4591	6044	97.88

ZIMBABWE	Direct Resident	1723	1850	2	3575	23.34
	Direct Non-Resident	5810	5914	18	11742	76.66
ZAMBIA	Direct Resident	58	118	95	271	1.98
		1855	2154	1327	5336	38.99
	Direct Non-Resident	-	-	8077	8077	59.03
	Madrid					
MADAGASCAR	Direct Resident	-	501	4320	4821	36.76
		-	2534	3845	6379	48.61
	Direct Non-Resident	-	-	1923	1923	14.63
	Madrid					
MALAWI	Direct Resident	247	468	252	967	13.47
	Direct Non-Resident	2386	2390	1437	6213	86.53

MAURITIUS	Direct Resident	481	1098	7580	9159	34.1
	Direct Non-Resident	1526	3213	-	4739	65.9
DRC	Direct Resident	879	639	-	1518	34.91
	Direct Non-Resident	1775	934	-	2709	64.09
SWAZILAND	Direct Resident	3	-	19	22	0.14
	Direct Non-Resident	3505	654	-	4159	27.61
	Madrid	-	877	10006	10883	72.25
SEYCHELLES	Direct Resident	21	20	2	43	2.06

	Direct Non-Resident	1036	703	307	2046	97.94
MOZAMBIQUE	Direct Resident	-	119	2427	2546	13.95
	Direct Non-Resident	-	2539	6776	2546	13.95
	Madrid	-	1480	11674	13154	72.09
LIBYA	Direct Resident	-	-	-	-	
	Direct Non-Resident	-	-	-	-	
ERITREA	Direct Resident	-	-	-	-	
	Direct Non-Resident	-	-	-	-	
BURUNDI	Direct Resident	30	57	20	107	7.48

	Direct Non-Resident	548	644	132	1324	92.52
RWANDA	Direct Resident	93	38	328	459	15.16
	Direct Non-Resident	732	471	1365	2568	84.84
LESOTHO	Direct Resident		-	-	-	-
	Direct Non-Resident	98	135	18	153	1.32
	Madrid		656	10646	11302	97.83
DJIBOUTI	Direct Resident	-	-	-	-	
	Direct Non-Resident	-	-	-	-	

COPYRIGHT REGISTRATION IN COMESA COUNTRIES

Registration of copyright does not confer protection but is *prima facie* evidence of authorship and date of publication. Three countries within COMESA, Kenya, Madagascar and Mauritius conduct registration of copyrights within their respective jurisdictions. Madagascar has a database that show local copyright registrations out-number foreign applications. Though the respective databases for Kenya and Mauritius only provide the total number of copyrights registrations, the assumption is that all registrations are local. The table below illustrates the trend in copyright registration in the three countries.

COUNTRY	PERIOD	REGISTERING AGENCY	ORIGIN	TOTAL REGISTERED
KENYA	2007- 2011	KECOBO	N/A	1794
MAURITIUS	2005- 2009	MASA	N/A	1390
MADAGASCAR	2005- 2010	OMDA	LOCAL FOREIGN	1020 1

INDUSTRIAL DESIGN REGISTRATION IN COMESA COUNTRIES (1980-2010)

Industrial design registration is not very active in the COMESA region. Some countries have national industrial design registration system others do not. The WIPO administered Hague Agreement provides an international system for registration of industrial designs. Except for Egypt and Ethiopia, most of the COMESA member states are not signatories to the Hague Agreement. The statistics below illustrate the trend in design registration among the COMESA member states.

COUNTRY	ORIGIN	1980-1989	1990-1999	2000-2010	TOTAL	% LOCAL & FOREIGN
KENYA	Direct Resident	-	90	285	375	75.96
		-				

	Direct Non-Resident		20	86	106	22.04
LIBYA	Direct Resident	-	-	-	-	
	Direct Non-Resident	-	-	-	-	
EGYPT	Direct Resident	789	-	-	789	4.35
	Direct Non-Resident	145	-	-	145	0.8
	Hague	-	4956	12245	17201	94.85
ETHIOPIA	Direct Resident	-	20	466	486	89.5
	Direct Non-Resident	-	1	55	56	10.31
	Hague	-	-	1	1	0.19

SUDAN	Direct Resident	-	-	249	249	100
	Direct Non-Resident	-	-	-	-	-
UGANDA	Direct Resident	-	-	-	-	-
	Direct Non-Resident	-	-	-	-	-
ZIMBABWE	Direct Resident	71	40	-	111	41.73
	Direct Non-Resident	90	65	-	155	58.27
ZAMBIA	Direct Resident	8	2	41	51	49.04
	Direct Non-Resident	19	26	8	53	50.96

MADAGASCAR	Direct Resident	-	350	2809	3159	96.61
	Direct Non-Resident	-	7	104	111	3.39
MALAWI	Direct Resident	44	30	23	97	56.73
	Direct Non-Resident	30	15	29	74	43.27
MAURITIUS	Direct Resident	-	-	-	-	-
	Direct Non-Resident	-	-	39	39	-
DRC	Direct Resident	554	1105	-	1659	96.17
	Direct Non-Resident	61	5	-	66	3.83
	Hague	-	-	-		-

SWAZILAND	Direct Resident	-	-	-	-	-
	Direct Non-Resident	20	8	-	28	100
SEYCHELLES	Direct Resident	-	-	-	-	-
	Direct Non-Resident	-	-	-	-	-
MOZAMBIQUE	Direct Resident	-	1	90	91	64.08
	Direct Non-Resident	-	-	51	51	35.92
ERITREA	Direct Resident	-	-	-	-	
	Direct Non-Resident	-	-	-	-	

DJIBOUTI	Direct Resident	-	-	-	-	-
	Direct Non-Resident	-	-	-	-	-
BURUNDI	Direct Resident	1	3	-	4	100
	Direct Non-Resident	-	-	-	-	-
RWANDA	Direct Resident	4	-	-	4	40
	Direct Non-Resident	-	1	5	6	60

STATISTICS ON PLANT BREEDERS' RIGHTS IN COMESA COUNTRIES

Except for Kenya, Tanzania and Zimbabwe, most of the COMESA member states do not have a legal regime for plant breeder's rights protection. Tanzania and Zimbabwe have not publicized their annual plant breeder's rights statistics. The table below provides the statistics on Kenya.

YEAR	ORIGIN	APPLIED	%	REGISTERED	% LOCAL & FOREIGN
1980- 1989	LOCAL	-	-	-	-
	FOREIGN	-	-	-	-
1990- 1999	LOCAL	69	25.09	-	-
	FOREIGN	206	74.91	-	-
2000- 2010	LOCAL	323	40.48	7	95.21
	FOREIGN	475	59.52	139	4.79

SITUATIONAL ANALYSIS OF IP PROTECTION IN SADC

The Southern African Development Community (SADC) is an inter-governmental organization of 15 member states. The objectives of SADC are *inter alia* to achieve economic growth and development through regional integration. The SADC countries are developing and least developed countries (LDCs). The developing countries include Botswana, Mauritius, Namibia, South Africa, Swaziland and Zimbabwe. The other countries are LDCs. The classification is important in understanding the obligations under the TRIPS Agreement to the respective countries.

In SADC as in all tripartite countries, IP laws are administered across several ministries including the Ministries of Trade, Commerce and Industry or their equivalents; Ministries of Law and Constitutional Affairs or their equivalents or the Attorney General's Office. Few countries have set up dedicated industrial property offices or agencies such as ZIPO, ROCIP, Copyright Administration & PACRO in Zambia and the Copyright Society of Malawi. In the SADC countries, the offices responsible for industrial property are understaffed and under equipped. National policies and strategies, where they exist, appear to be developed in isolation, without due regard to the commonalities that exist in the region resulting in poor coordination of policy within and across national boundaries.

Multilateral and Regional Framework for IP Protection in SADC Countries

All countries in the SADC are members of WTO and WIPO and are signatories to several international conventions dealing with intellectual property. The multilateral regime on IP protection is uniform for the EAC, COMESA and the SADC countries. For SADC countries that are members of ARIPO, the ARIPO regional framework on IP protection applies. In terms of IP policy, SADC has a regional IP policy that provides guideline to its member states.

The SADC Protocol on Trade in Articles 9 (d) and 24 thereof deals with enforcement and protection of intellectual property. Article 9 (d) stipulates that nothing in the Trade Protocol shall prevent members from adopting or enforcing measures necessary to protect IPRs or to prevent deceptive trade practices. This provision strengthens the protection of IPRs. The practical implication is that enforcement of IPRs shall not be construed to be a trade barrier. Article 24 of the Protocol adopts the WTO TRIPS Agreement. The Article stipulates that SADC member states shall adopt policies and implement measures within the Community for protection of intellectual property rights in accordance with the WTO TRIPS Agreement.

National Framework for Patent Protection in SADC Countries

SADC countries have national patent legislation through which patents are registered.⁴⁴ The legislations have fundamentally similar provisions to the ARIPO Harare Protocol on Patents and Industrial Designs and the WTO TRIPs Agreement. An invention is patentable if it is new, involves an inventive step and is industrially applicable.⁴⁵ This criterion has uniformly been adopted from the TRIPS Agreement. The substantive patent rights are provided for in the ARIPO Harare Protocol and TRIPS Agreement.

The SADC countries of Tanzania, Zimbabwe, Zambia, Botswana, Rwanda, Malawi, Namibia, Lesotho, Mozambique, and Swaziland are members of ARIPO and therefore subscribe to the Harare Protocol on patents and industrial designs protection. SADC member states national legislation provide for the term of protection. In all SADC countries (except Seychelles, Angola, Malawi and Lesotho) a patent is valid for a period of twenty years.⁴⁶ In Seychelles, a patent is valid for fourteen years while in Lesotho and Angola, the term is fifteen years after which it may be renewed (Sect 14 & Art 6). Malawi has a protection period of sixteen years (Sect 29).

A grant of patent confers substantive exclusive rights to the patent holders. The substantive rights include precluding third parties from inter alia making, selling, importing, using, stocking or offering for sale the product. If it is a process patent, the

⁴³ DRC; [Law No. 82-001 of January 7, 1982 on Industrial Property](#), Zambia; [The Patents Act \(Chapter 400\)](#) Botswana; [Industrial Property Act, 2010](#), Namibia; Industrial Property Act, 2008, Lesotho; [Industrial Property Regulations, 1989](#), Madagascar; [Ordinance No. 89-019 Establishing Arrangements for the Protection of Industrial Property \(of July 31, 1989\)](#), Malawi; [Patents Act, Chapter 49:02](#), Mauritius; [Patents, Industrial Designs and Trademarks Act 2002](#), Seychelles; [Patents Act, Chapter 156](#), Swaziland; [Patents, Utility Models and Industrial Designs Act, 1997](#), Zimbabwe; [Patent Act \(Chapter 26:03\)](#), Tanzania; The Patent Act of 1987, South Africa; Patents Act (Act 57 of 1978) & Mozambique; [Industrial Property Code \(approved by Decree No. 04/2006 of April 12, 2006\)](#)

⁴⁴ Ibid: South Africa; Sect 25, Mozambique; Art 24-28, Mauritius; sect 12, Lesotho; sect 5, Botswana; sect 8, DRC; Art 6-11, Angola; Art 3, Swaziland; sect 4 & Tanzania; sect 7-11

⁴⁵ Ibid: South Africa; sect 46, Zimbabwe; sect 25, Mozambique; Art 66, Mauritius; sect 22, Madagascar; Art 4-7, Botswana; sect 28, DRC; Art 36, Swaziland; sect 13 & Tanzania; sect 39

exclusive rights prohibit third parties from using the patented process or selling products produced using the patented process.⁴⁷

Respective SADC national patent legislations provide for enforcement of patent rights. The patent owner may claim damages and compensation in cases of infringement.⁴⁸ Section 48 of the Zimbabwe Patent Act provides that a patent holder or the exclusive license holder is the only person capable of instituting an infringement action. Under the Act, the High Court and respective Intellectual Property Tribunal (established by Section 3 of the Intellectual Property Tribunal Act [Chapter 26:06]) are bodies with jurisdiction to deal with infringement of patent rights. Under section 48 (6), such a suit cannot be brought three years after the expiry of the patent in question. Section 48A of the Act provides that an Anton Piller order is open to utilization by the patent owner intending to sue for infringement.⁴⁹

The South African patent law has penalty for infringement of patent rights. Under Sections 81 and 82 of the Act, a person who makes false entry in the patent register or gives a false representation is guilty of an offence. Section 83 further defines trafficking, purchase, sale and acquisition of patents by an officer or employee within the patent office as an offence. Any such transaction is null and void.

In DRC legislation, a deliberate or intentional infringement of a patentee's rights constitutes the offence of counterfeiting and attracts civil and criminal liability (Article 88). Under Article 93, the offence of counterfeiting attracts a sentence of between one to six months with an option of a fine.

⁴⁶ Ibid: South Africa; sect 45, Zimbabwe; sect 24(4(a)), Mozambique; Art 67, Mauritius; 21, Lesotho; sect 13, Madagascar; Art 27, Malawi; sect 28(4), Botswana; sect 24, DRC; Art 48, Swaziland; sect 12 & Tanzania; section 36

⁴⁷ Ibid: Madagascar; Art 27, Lesotho; Sect 13, South Africa; sect 65, Zimbabwe; sect 24(4(a)), Botswana; sect 27, Tanzania; sect 36

⁴⁹ An Anton Piller Order is an interlocutory injunctive relief which derives its name from the UK Court of Appeal case decided in UK in 1976 by the name of ANTON PILLER K.G. vs Manufacturing Processes Ltd (1976) Ch. 55. An Anton Piller is an ex-parte application supported by affidavit and the court sits in camera. There must be extremely strong prima facie case on merit and indication that the defendant's activities may cause very serious potential harm to the plaintiff's interests.

Plant Breeders' Rights Protection in SADC Countries

Protection of plant breeders rights (PBRs) remain a challenge to a majority of SADC member states due to inadequate legislation. South Africa is the only SADC member that has acceded to UPOV (1978). South Africa has enacted the *Plant Breeders' Rights Act, 15 of 1976* that provides the legal framework for protection of new plant varieties. The Act was amended in 1996 to be in tandem with UPOV 1991.

Zimbabwe has a PBRs legislation that has been operational for the past 30 years. However, the country is not a member of UPOV. Tanzania has enacted plant variety protection legislation likewise Swaziland and Malawi. Mauritius and Mozambique are all engaged in formulating a legal framework for PBR protection. Namibia and Angola have PBRs draft legislations which do not conform to UPOV. Lesotho has no PBR legislation or draft bill at the moment.

South Africa's *Plant Breeders' Rights Act, 15 of 1976* as amended in 1996 is UPOV (1991) compliant. The Act stipulates the criteria for registration of a new plant variety, term of protection, rights conferred and enforcement on infringement. Section 2 of the Act provides that a seed and plant variety qualifies for application and subsequent registration only if it is new, distinct, uniform and stable. A variety is considered new if the propagating material has not been sold or disposed of by the breeder. Distinction is inferred if the applied variety is distinguishable from any other existing variety that is well known within the public domain. Stability of the variety means that the characteristics of the said variety remain unchanged even after repeated propagation. Uniformity of a variety requires that all characteristics of the variety be uniform with little or no variation. The Act in Section 6 thereof stipulates that to be eligible for PBRs application, a person must be either be a citizen of South Africa, domiciled in South Africa or is a citizen of a country that is a member to the UPOV Convention.

In South Africa, the term of protection for vines and tress is twenty five years. For all the other varieties, the term is twenty years from registration. This is in line with UPOV. Pursuant to Section 23 of the Act, registration grants the right holder exclusive rights over the protected variety in relation to production/reproduction, propagation, sale or marketing, exporting, importing and stocking of propagated and harvested material of the variety. Any undertaking by a third party of any of the acts under the exclusive rights of the breeder constitutes infringement of the plant breeder's rights (Sect 23A). The Act creates various offences in Section 45 thereof and this attracts a fine or imprisonment.

Protection of Trademarks in SADC countries

All member countries of SADC have national trademark legislations.⁵⁰ The legislations set the criteria that must be met by prospective trademark applicants. A mark is registrable if it is distinctive, not deceptive and neither confusing nor descriptive. The term of protection of trademark protection varies among SADC member States. In Mozambique, Mauritius, Lesotho, Madagascar, DRC, South Africa, Zimbabwe, Swaziland registered trademarks have a term of protection of 10 year subject to renewal.⁵¹ Under Malawi and Zambian Trademark Acts, a registered trademark has a fixed duration of seven years; within which the mark owner enjoys exclusive rights over the mark and can renew it upon expiration of the duration⁵².

Registration of a trademark confers upon the proprietor substantive rights. The proprietor is granted exclusive rights to prevent a third party from making use of an identical or similar signs for goods or services that are identical or similar to those for which the mark has been registered, if such use is likely to lead to confusion.⁵³ A proprietor can institute judicial proceedings against any party who infringes the mark by using it without his consent or who performs acts likely to constitute infringement. This right covers the use of a sign similar to the registered mark and its use in relation to goods or services similar to those for which the mark has been registered, where this may lead to confusion⁵⁴.

⁴⁹ **Mozambique;** [Industrial Property Code \(approved by Decree No. 04/2006 of April 12, 2006\)](#), **Zambia;** [The Trade Marks Act \(Chapter 401\)](#), **Angola;** [Law No. 3/92 on Industrial Property of 28 February 1992](#), **Botswana;** [Industrial Property Act, 2010](#), **Namibia;** [Trade Marks in South West Africa Act](#), **Lesotho;** [Industrial Property Order, 1989](#), **Madagascar;** [Ordinance No. 89-019 Establishing Arrangements for the Protection of Industrial Property \(of July 31, 1989\)](#) (1989), **Malawi;** [Trade Marks Act, Chapter 49:01](#), **Mauritius;** [Patents, Industrial Designs and Trademarks Act 2002](#), **Seychelles;** [Patents Act, Chapter 156](#) (1991), **Swaziland;** [Trade Marks Act, 1981](#), **Zimbabwe;** [Trade Marks Amendment Act, 2001](#), **Tanzania;** [The Trade and Service Marks Act, 1986](#), **DRC;** [Law No. 82-001 of January 7, 1982 on Industrial Property](#) & **South Africa;** Trade Marks Acts (Act 62 of 1963 and Act 194 of 1993

⁵⁰ Ibid: Mozambique; Art 120, Mauritius; sect 41, Lesotho; sect 29(4), Madagascar; Art 69,DRC;Art 137, SA; sect 37, Botswana; sect 85, Zimbabwe; sect 24, Swaziland; sect 29.

⁵² Ibid: Malawi; Sect 25 & Zambia; sect 25.

⁵² Ibid: Mozambique; Art 124, Tanzania; sect 31 & 32, Mauritius; sect 40(1), Lesotho; sect 29 (1), Madagascar; Art 66, Malawi; sect 9, DRC; Art 138, Botswana; section 81, Zimbabwe; sect 8, Swaziland; sect 31&32, Zambia; sect 9&10 .

⁵³ Ibid: Mozambique; Art 124(5), Tanzania; sect 32, Mauritius; sect 40(2) & (3), Lesotho; sect 29(2), DRC; Art 148, South Africa; sect 34, Botswana; sect 83.

Under Malawian Trademark Act, false representation that a mark is registered is an offence and attracts a fine not exceeding five hundred pounds or imprisonment for not more than six months. In Tanzania, falsification of an entry into the trademark register is an offence (Sections 56). Any person who makes a false representation with reference to a mark that is not actually registered is guilty of the offence of false representation and is liable for a jail term of not more than seven years or a fine of up to fifty thousand shillings (Section 57). In Mozambique infringement of a trademark constitutes an offence and attracts a fine of not exceeding 250,000 rupees or an imprisonment term of not more than five years. In terms of civil remedy, an aggrieved trade mark owner can sue for damages and the court may order forfeiture of any article used the unfair trade practice (Section 52(3)). The Lesotho trade mark legislation creates the offence of infringement of a registered mark. Under Section 43, the court has the power to prevent infringement or imminent infringement. The court may award damages or any other remedy. The penalty of any act of infringement is either payment of fine of up to M10, 000 or an imprisonment term not exceeding 10 years. Under Section 84 of the Madagascar trade mark legislation any form of infringement of a trade mark is an offence and a fine of MGF 500,000 or imprisonment of between six months and three years can be imposed. A repeat of such offence attracts a double penalty. A trademark owner has the right to seek a court order for seizure of articles bearing the infringed mark. Section 86 of the Madagascar Trade Marks Act provide for confiscation of articles bearing infringed mark by the owner through the help of law enforcers.

In the South African Trademark Act, false representation of a mark as registered is an offence and attracts a fine or a term of imprisonment not exceeding twelve months. Falsification of entries in the trademark register is an offence which attracts a jail term of not more than one year or a fine. Section 61 defines making of false statements with the aim of deceiving/influencing the registrar to constitute an offence under the Act. Such an offence attracts a fine or an imprisonment of not more than one year. Under the Zimbabwean Trademark Act, false representation of a mark or falsification of entry in the register or deceiving/influencing the registrar to register a mark constitutes offences that attract a fine or a term of imprisonment.

At the multilateral level, Zambia, Madagascar, Tanzania, Lesotho, Namibia and Swaziland are SADC member countries signatory to the WIPO Madrid Agreement on Trademarks. The Agreement enables an applicant to make one application and designate several countries that are party to the Agreement.

At the regional level, the ARIPO Banjul Protocol on Trademarks applies to some SADC countries who are signatories thereto. Presently, Botswana, Lesotho, Liberia, Malawi, Namibia, Swaziland, Uganda and Zimbabwe are signatories to Banjul.

Industrial Designs Protection in SADC Countries

Most SADC member countries have national legislations on industrial designs.⁵⁵ Two countries, Namibia and Botswana, are signatory to the Hague Convention on Industrial Designs. Tanzania, Zimbabwe, Zambia, Botswana, Malawi, Namibia, Lesotho, Mozambique, and Swaziland are ARIPO members and are signatories to the Harare Protocol on Patents and Industrial designs.

The criteria for registration of industrial designs are outlined in the respective SADC member state legislations. An industrial design is registrable if it is new and original.⁵⁶ The term of protection for registered designs vary among the SADC countries though most have similar durations. In Botswana, Malawi, Madagascar, Lesotho, Mauritius, Swaziland the term is five years from the date of filling and renewable for two consecutive periods of five years.⁵⁷ In DRC, the protection period is five years renewable (Art 119). In Mozambique, the term is five years renewable for like periods up to a maximum of twenty-five years (Art 107). South Africa through its Design Act has provision for two types of registered designs. Under Section 22 of the Act, the term of protection for an aesthetic design is fifteen years while the term for a functional design is ten years. Both registrations are renewable.

⁵⁴ **Zambia;** [The Registered Designs Act \(Chapter 402\)](#), **Malawi;** [Registered Designs Act, Chapter 49:05](#), **Zimbabwe;** [Industrial Designs Act \(Chapter 26:02\)](#), **DRC;** [Law No. 82-001 of January 7, 1982 on Industrial Property](#), **Namibia;** Industrial Property Act, 2008, **Madagascar;** [Ordinance No. 89-019 Establishing Arrangements for the Protection of Industrial Property \(of July 31, 1989\)](#), **Mauritius;** [Patents, Industrial Designs and Trademarks Act 2002](#), **Seychelles;** [Patents Act, Chapter 156](#), **Swaziland;** [Patents, Utility Models and Industrial Designs Act, 1997](#), **Tanzania;** [The Zanzibar Industrial Property Act No. 4 of 2008](#), **Botswana;** [Industrial Property Act, 2010](#), **Lesotho;** [Industrial Property Regulations, 1989](#), **Seychelles;** [Patents Act, Chapter 156](#), **Mozambique;** [Industrial Property Code \(approved by Decree No. 04/2006 of April 12, 2006\)](#) & **South Africa;** Designs Acts (Act 57 of 1967 and Act 195 of 1993)

⁵⁵ Ibid: Botswana; sect 45, DRC; Art 108,109 & 111, Malawi; sect 9, Madagascar; Art 90, Lesotho; sect 20, Mauritius; sect 28, Mozambique; Art 98, SA; sect 14, Swaziland; sect 19

⁵⁷ Ibid: Botswana; sect 56, Malawi; sect 15, Madagascar; Art 106&107, Lesotho; sect 24(4), Mauritius; sect 33, Swaziland; sect 23(5)).

Registration of an industrial design confers substantive rights to the owner.⁵⁸ The registered owner is entitled to prevent third parties from commercially exploiting the protected design.⁵⁹ The remedies for infringement include relief in the form of interdiction, damages, seizure, delivery up or destruction of the infringing product, account for profits accruing from the infringement and any other remedy granted by the respective court.

Copyright Protection in SADC Countries

The copyright legislations of SADC member states are all based on the provisions of the Berne Convention.⁶⁰ In all SADC countries, the criteria for copyright protection and the substantive rights conferred as well as the enforcement provisions are borrowed from Berne Convention. Notable variations arise on the term of copyright protection. All the countries within SADC except for Seychelles, Mozambique and Madagascar have a 50 year protection period from the death of the author as set by the Berne Convention. Seychelles has a twenty five year protection while Mozambique and Madagascar have seventy year protection period from the death of the author.

In tandem with the international copyright regime, copyright does not exist by virtue of registration but publication in a tangible form. Three SADC member countries, South Africa, Mauritius and Madagascar, have a copyright registration database.

In all SADC countries, the owner of a copyright protected work has economic rights over the work which is the exclusive right to publish, produce or reproduce the work; distribute or make available to the public the original or copies of the work through

⁵⁷ Ibid: Botswana; sect 53, DRC; Art 119, Malawi; sect 14, Madagascar; Art 104&105, Lesotho; sect 24(1), Mauritius; sect 32(1)&(2), Mozambique; Art 108(1)&(2), SA; sect 20, Swaziland; sect 23(1)&(2)

⁵⁸ Ibid: Botswana; sect 55, DRC; Art 121, Lesotho; sect 24(3), Mauritius; sect 32(4), Mozambique; Art 108(3), SA; sect 35 (1)&(2), Swaziland; sect 23 (4)

⁵⁹ **DRC**; [Ordinance-Law No. 86-033 of April 5, 1986 on the Protection of Copyright and Neighboring Rights](#), **Zambia**; [Copyright and Performance Rights \(Amendment\) Act, 2010 \(Act No. 25 of 2010\)](#), **Angola**; [Law on Author's Rights \(No. 4/90 of 10 March 1990\)](#), **Botswana**; [Copyright & Neighboring Rights Act, 2000](#), **Namibia**; [Copyright and Neighbouring Rights Protection Act 6 of 1994](#), **Madagascar**; [Decree No. 98-435 of 16 June 1998 on General Rules for the collection of copyright and neighboring rights](#), **Mozambique**; , **Malawi**; [Copyright Act, 1989](#), **Mauritius**; [Copyright Act 1997](#), **Seychelles**; [Copyright Act, Chapter 51](#)(1997), **Zimbabwe**; [Copyright and Neighboring Rights Act \(Chapter 26:05\)](#) & **South Africa**; Copyright Act (Act 98 of 1978)

sale or other means of transfer of ownership; perform the work in public; broadcast the work; communicate the work to the public by wire or wireless means or through any known means or means to be known in the future, including making the work available to the public through the internet or in such a way that members of the public may access the work from a place and at a time individually chosen by them. Where the copyrighted work is a pre-existing work, the owner has the right to make a derivative work, commercially rent or sell the original or copies of the work; or do in relation to that work any act known or to be known in the future and to reproduce transcription of the work into Braille which is accessible to blind persons.⁶¹

The copyright holder has moral rights over the works which is the right to object to and seek relief in connection with any distortion, mutilation, alteration or modification of the work and the right to have the author's name or pseudonym mentioned or acknowledged each time the work is used. The moral right includes a right to claim authorship of that work, except where the work is included incidentally or accidentally in reporting current events by means of media or other means.⁶²

The copyrights legislations of SADC member states provide for enforcement of copyright and protected works.⁶³ The copyright owner is entitled to civil remedies that include damages, injunctions, delivery up of infringed copies or materials, seizure of infringed materials and account for profits.⁶⁴ Criminal penalty is available for infringement.

Protection of Traditional Knowledge in SADC countries

South Africa is the only SADC member state that has a draft TK policy. Mozambique has an IP Strategy that address protection of TK. Other SADC member countries lack any form of policy or legislation that deal with traditional knowledge as a subject

⁶⁰ Ibid: Zimbabwe; sect 17-23, Tanzania; sect9, South Africa; sect 7-11, Seychelles; sect 10-13, Namibia; sect 7-13, Mozambique; Art 7, Mauritius; sect 4, Malawi; sect 8, Madagascar; Art 30&31, Lesotho; sect 7, Botswana; sect 7 & Angola; Art 17

⁶¹ Ibid: Zimbabwe; sect 61-65, Tanzania; sect 11, South Africa; sect 20, Namibia; sect 25, Mauritius; sect 5, Malawi; sect 9, Madagascar; Art 21, Lesotho; sect 8, Botswana; sect 8, Angola; Art 18 & Zambia; sect 24

⁶² Ibid: Zimbabwe; Sect 51&59, Tanzania; sect 41(3), South Africa; sect 23, Seychelles; sect 21, Namibia; sect 29 & 33, Malawi; sect 47, Madagascar; Art 145, Angola; Art 31& Zambia; sect 17-20&28

⁶³ Ibid: Zimbabwe; sect 52, Tanzania; sect 43(1), South Africa; sect 24, Seychelles; sect 19(2), Namibia; sect 30, Mozambique; Art 69-70, Mauritius; sect 40(2), Malawi; sect 49, Lesotho; sect 36, Botswana; sect 30 & Zambia; sect 25

matter of IP. The Protection of Traditional Knowledge Bill of South Africa seeks to provide a framework for protection of traditional knowledge. The scope of the Bill is protection of traditional work, traditional design and traditional marks (Section 1). Any of the three traditional knowledge components is eligible for protection if they are reduced to a material form; reduced by or on behalf of the originating traditional community and recognized as being derived from and characteristic of, that community by persons outside that community (Sect 2, 8 and 13). Section 13 provides that a traditional mark need to be represented graphically.

Protection of the respective components of traditional knowledge gives rise to vesting of exclusive rights on the rights holders or owners. Ownership of a protected traditional knowledge vests upon a person in representative capacity designated from time to time as the community proxy of the originating community (Sect 40). Protected traditional work guarantees the owner exclusive rights to activities in relation to the work which include reproduction, publication, performance, broadcasting, transmission by diffusion service, making adaptation of it, sale, importation and distribution for trade a piece of the protected work (Sect 3). Protection of traditional design guarantees the right holder exclusive right to exclude third parties as regard the importation, use, disposal and making of the design or any article embodying the protected design (sect 9). A protected traditional mark on the other hand give rise to the exclusive right to register the respective mark as a collective mark, trade mark or certification mark under the Trade Marks Act (Sect 14). Essentially, all the rights arising out of registering a trademark would therefore be similarly conferred upon a holder of traditional mark. The bill further provides for moral rights derivative from protected traditional knowledge where the respective work, design or mark is an item or is derived from an item of traditional knowledge. The respective owner is therefore granted unlimited right against any distortion, mutilation and any other modification that would be prejudicial to the honor or public esteem of the originating traditional community (Sect 43).

A traditional work is guaranteed protection for fifty years as from the date of first publication and if it is unpublished, it enjoys an indefinite term of protection (Sect 5). A traditional design is protected for a term of 15 years from the date of first publication and if unpublished, the term of protection is indefinite (Sect 11). Under Section 42 of the Bill, any act of infringement of an item of traditional knowledge is actionable by the right holder. A relief by way of an interdict, delivery up of any infringing article or damages can be granted.

The African Union passed the 2001 African Model Law for Protection of Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources. The model law provides guidelines that would enable African countries meet the challenges and commitments in biodiversity, intellectual property and trade. The model law covers access to

biological resources, community rights, farmer's rights and plant breeder's rights.⁶⁵

Appendix 2 is a table for tripartite countries intellectual property statistics 2010 (applications filed).

RESEARCH FINDINGS

Evaluation of the legal and policy framework for IP protection in the tripartite states demonstrates multiple findings. All tripartite states have the following characteristics:

- (a) More than three quarters of the tripartite countries do not have a national IP policy or strategy. The implication is that there is no policy or strategic direction, synergy and coordination among the various IP stakeholders.
- (b) The tripartite states (except Eritrea) are members of WTO and WIPO and the minimum international standards for industrial property and copyright protection is the same for all the countries.
- (c) The national legislation on patents, industrial designs, utility model, trademarks and copyright is substantially similar in all tripartite states. The criteria for protection and substantive rights conferred are substantially the same. This is due to the multilateral legal regime that they have adopted.
- (d) More than half of the tripartite states are members of the African Regional Intellectual Property Organization (ARIPO). It may be germane that all tripartite members should be encouraged to join ARIPO as a way of pooling resources to strengthen the institutional capacity for IP management, registration and administration.
- (e) A majority of the tripartite countries have no legal framework for recognition and protection of Traditional Knowledge, Expressions of Culture and Folklore.
- (f) All the tripartite states have some form of legal regime protecting trade secrets and undisclosed legislation. Most use the common law principles and do not have specific trade secret legislation.
- (g) A majority of the tripartite countries have no legal regime for protection of new plant varieties. It is recommended that the countries should explore the possibility of enacting a *sui generis* system for varietal protection.

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See Ekpere J.A. African Model Law on the Protection of the Rights of Local Communities, Farmers' and Breeders, and For the Regulation of Access to Biological Resources in Nnadozie, K. et al, African Perspectives on Genetic Resources, A Handbook on Law, Policies and Institutions, Washington DC. 2003 at 277.

- (h) The legal framework of most tripartite states does not address the issue of exhaustion of intellectual property rights. It is recommended that a regional exhaustion should be adopted as a trade facilitation measure.
- (i) From an institutional and administrative perspective, IP is administered across several line ministries and this demands that coordination should be given priority.
- (j) The existing national IP offices are not ICT compliant, have limited human resource capacity in terms of patent examiners and understaffing in the technical areas is a common feature.
- (k) There is low to non-existent IP enforcement success stories despite reported cases of piracy, infringement and counterfeiting. The implication is that the legal system is not equipped to prosecute crimes involving IP infringement.
- (l) Statistics reveal that the level of utilization of the IP legal regime is low. This conclusion is drawn from the limited number of industrial property applications by residents. Awareness creation and promotion of creativity and inventiveness should be encouraged.

GAPS IN IP LEGAL AND POLICY FRAMEWORK IN THE TRIPARTITE STATES

In a world where many industrial country firms are acquiring intellectual property rights covering fundamental research tools and marketable produces, it is becoming difficult for developing and least developed countries such as the Tripartite states to ignore IPR polices. Various challenges and gaps exist in the legal and policy framework of these countries that inhibit their effective utilization of IP as a tool for socio-economic development. The policy gaps include:

- (a) Lack of clarity on the role of government in IP policy formulation, implementation and administration.
- (b) Absence of national IP policy.
- (c) Challenges in IP coordination.
- (d) Lack of empirical data for policy formulation and no data to ascertain the impact of IP on the national economy of individual states.
- (e) Property status of IP genetic resources and medicinal plants remain unclear.
- (f) Protection of traditional knowledge and expressions of culture and folklore is weak and in a majority of countries non-existent.
- (g) No clear policy on protection of plant breeder's rights and breeder's exemption as well as farmer's rights and farmer's privilege.
- (h) Multiple membership and commitment to potentially conflicting multilateral IP treaties.

- (i) Challenges in the institutional set up for IP administration and enforcement.
- (j) Lack of sufficient and well trained human resource personnel for IP administration.
- (k) Absence of clear policy on exhaustion of intellectual property rights.

A fundamental drawback to the tripartite IPRs regime is the challenge to have an IP system that is comprehensive enough to cover technologies in modern biotechnology yet ensuring fair competition so that one or a few corporations do not control vital research tools and inputs especially in agriculture and ICT. The challenge for policy makers is to strike a balance between the need to access modern technologies and the need to access markets and biodiversity.

A majority of the tripartite countries do not have a national intellectual property policy. The countries should be encouraged to formulate such a policy bearing in mind that intellectual property policy formulation is a varied terrain as the policy agenda is contested by numerous stakeholders including government, civil society, the private sector, donors and regional or international alliances. The stakeholders are varied because IP is cross-cutting in different sectors such as health, education, food security and trade. Co-ordination and clarity is essential to policy formulation. In formulating the policy, empirical data, expert opinion and stakeholder views and experiences should be taken into account. Government should ensure that development of the IP System is driven as far as possible by objective evidence.

In formulation a national IP policy, the policy makers need to ensure that research and development (R & D) sector serves the national economy. The scope and breadth of IP protection within the minimum WTO standards should clearly be defined so as to maximize social welfare and to achieve certain distributional objectives. The IP policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests.⁶⁶

In the realm of plant and varietal protection, the property status of genetic resources and medicinal plants is a subject of political debate. The challenge is to ensure that these valuable plants remain in the public domain and are not privatized. Recognizing farmer's rights is a challenge. The international community recognizes the critical role farmers and indigenous

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The Development of Intellectual Property Policies in Africa- Some Key Considerations and a Research Agenda *Caroline B. Ncube, Senior Lecturer, Department of Commercial Law, University of Cape Town, South Africa* Ncube, Intel Prop Rights 2013, 1:1

peoples have played in preserving biodiversity and providing knowledge of the value of plants and forest resources for food and medicine. The challenge is to ensure that national IPRs are supportive of and do not undermine farmers rights. All the tripartite countries should adopt a *sui generis* legislation for plant breeder's rights.

Noting that most of the tripartite states are signatories to numerous international IP conventions, the challenge is complying with these various treaties. Almost all tripartite states are under pressure from the TRIPS Agreement and the Convention on Biological Diversity (CBD) that have potentially conflicting approach to protecting and conserving natural resources. Despite these conflicting approaches, IP is one among many mechanisms for bringing about development. IP should be used to support and enhance the legitimate economic aspirations of all developing countries including LDCs, especially in the development of their productive forces, comprising of both human and natural resources. IP should be complimentary and not detrimental to national efforts at development.

Each of the tripartite economic groupings recognizes the importance of intellectual property. However, the impact of IP in the development process has not been evaluated and this is empirical. It is recommended that an IP audit should be undertaken to determine the impact and contribution of IP to the tripartite national economies.

In terms of institutional framework, most of the tripartite countries experience similar challenges in IP administration and enforcement. National IP officer have weak capacities for IP policy formulations. There is lack of coordination in IP matters as different governmental entities deal with different IP subject matter. There is lack of local technical skills and expertise to effectively manage IP related matters. There are no dedicated patent attorneys and no vibrant IP users associations. The legal systems are not adequately equipped to prosecute cases involving IP disputes. The rapid developments in new and emerging technologies in ICT and biotechnology pose a challenge. Most of the existing IP offices are not computerized and networked. Acquisition of ICT software and hardware is a major challenge coupled with the fact that the offices are financially dependent on the central government.

POLICY OPTIONS TO ADDRESS IDENTIFIED GAPS

1. Enhanced Role of Government in IP Policy Formulation and Administration

The starting point in addressing the policy gaps and challenges facing tripartite states is to refocus the role of government in IP policy formulation and implementation. An efficient and equitable IP system can help a country realize its intellectual property potential as a powerful tool for economic development and socio-cultural well-being. The IP system strikes a balance between the interests of the innovator and the public by providing an environment in which creativity and innovation is to flourish. The Government has a responsibility to harness and release the IP potential in the country. The government role includes:

- (a) Formulating national IP policy and strategy for socio-economic development
- (b) Enacting laws for effective protection of IPRs
- (c) Establishing national administrative and regulatory IP policy framework
- (d) Advancing national security and restrictions on exclusive rights granted
- (e) Promoting and encouraging innovation and creativity
- (f) Promoting technology transfer and licensing
- (g) Formulating a link between development goals and intellectual property rights
- (h) Promoting commercialization of local inventions and setting up innovation hubs and incubation centres
- (i) Coordinating and facilitating stakeholder activities in IP
- (j) Implementing IP international and regional obligations
- (k) Putting in place effective IPR enforcement mechanisms
- (l) Establishing the link between IP and science and technology, agriculture, health, education and industrial development. To this end, a national innovation policy should be formulated.
- (m) Taking a leading role in norm creation at regional and international forums particularly the development dimension of IPRs and issues of protection of genetic resources, traditional knowledge and expressions of folklore.

2. Formulating National and Regional IP Strategy/Policy

A national/regional IP policy is the road map that promotes creativity and innovation in a country/region. It provides the

framework for recognition and protection of intellectual property rights, enforcement mechanisms and access to IP based goods and services and promotes research and development. The policy improves national compliance with regional and multilateral IP treaties as well as promoting public awareness. It introduces a public health perspective to IP protection and embraces technology transfer concerns and improves investor confidence. It provides for a coordinated approach to IP administration. A well thought out national IP policy contributes to economic social and technological development and eradication of poverty, access to medicine, technology, education and learning materials. Each of the tripartite states and/or each regional bloc in the tripartite area should develop a comprehensive IP policy and cascade its implementation among the member countries. Presently, COMESA and SADC do have a regional IP policy that is yet to be cascaded among their member states. The EAC does not have an IP strategy or policy.

3. Appreciating the Interface between IP and Access to Medicine

Intellectual property has a significant role to play in public health and access to medicine. There are four main public policy issues that should be considered, these are impact of IP policy on drug quality; drug selection; price; drug procurement and funding.

4. Address the Question of Exhaustion of IP Rights

Cooperation by the tripartite countries on IP involves the issue of exhaustion of IPRs especially in the pharmaceutical sector. The exhaustion principle can be a trade facilitator or a trade barrier. Under exhaustion, the proprietor of an intellectual property right cannot rely on IP law to prevent the importation of a product which has been lawfully marketed in another state or country by the proprietor or with his consent.

There are three different types of exhaustion namely: national, regional and international exhaustion. International exhaustion is of the largest scope. If a good or service is first sold or placed on the market of any country, then the IPRs as embodied in the good or service is deemed exhausted with regard to all the other countries of the world. The good or service first sold or placed can thereafter be more or less freely transferred and traded within and across the national borders of all countries of the world. With regard to national or regional exhaustion, the principle is the same respectively within a particular country or region. The European Union follows the principle of regional exhaustion while USA, Japan, Switzerland, South Africa and some Latin American countries adhere to international exhaustion. The tripartite countries have not made a clear policy stand

whether they adopt national or international exhaustion. To facilitate regional trade, it is recommended that the principle of regional exhaustion should be adopted by the tripartite countries.

5. Policy Options in Traditional or Alternative Medicine

The tripartite states should be pro-active and appreciate the role of traditional medicine in the health of their population. As a policy option, the traditional healers' knowledge should be protected through an appropriate *sui generis* regime or using customary law. The tripartite states should effectively participate in international negotiations to be put in place a regime that recognizes traditional medicinal knowledge. Systematic cultivation of medicinal plants should be introduced to conserve biodiversity and protect threatened species. There is need to formulate an array of incentive measures to ensure that members of the younger generations would desire to learn, value, adapt and apply traditional knowledge. Governments should create an environment where the traditional healers can communicate with researchers and reveal secret medicinal cures and their beliefs of treatment. Governments should take positive steps to resolve differences and disagreements between the traditional herbalists and modern medical practitioners.

6. Redefine Technical Assistance in the Context of IP Management

Most of the tripartite states are least developed countries and do seek technical assistance from WIPO and WTO. The term Technical Assistance (TA) refers to donation of expertise. Traditionally, technical assistance encompass consultancy, upgrading management, governance improvement, exchange of information, training, know-how transfer and on-site training. In the context of IP development, the tripartite states should re-define the nature of technical assistance to cover issues outside the traditional scope of TA. These include, provision of hardware and equipment, provision of funds for development of infrastructure (i.e. development aid), provision of working capital and other overhead expenditure and training of patent examiners.

7. Prepare IP Audit Reports and Need for Harmonization

The tripartite member states should conduct an audit of the impact of IP to the national economy with a view to harnessing consensus and recommending appropriate action to be taken to promote creativity and inventiveness in the country. The audit reports will help to harmonize and develop a uniform IP strategy across the tripartite states.

8. Enhance Awareness and the Value of IPR for SMEs

Trade cooperation among the tripartite states revolves around the Small and Medium Enterprises (SMEs). Among the SMEs, the value of IP is often not appreciated and its potential for providing opportunities for future profit is underestimated. Like physical assets, IP assets must be acquired and maintained. SMEs should be sensitized on how IP rights may be acquired particularly:

- (a) Innovative products and processes (through patents and utility models);
- (b) Cultural, artistic and literary works including protection of computer software and compilation of data (through copyright and related rights protection);
- (c) Creative designs, including textile designs (through industrial design rights);
- (d) Distinctive signs (mostly through protection of trademarks including collective and certification marks, but in some cases through geographical indications; see below);
- (e) Microchips (through protection of layout-designs or topographies of integrated circuits);
- (f) Denominations for goods of a given quality or reputation attributable to the geographical origin (through protection of geographical indication; and
- (g) Trade secrets (through protection of undisclosed information of commercial value).

9. Enhance Role of IP in the Digital Economy

Intellectual property in the digital economy is a critical driver of technological innovation and economic competitiveness. It is the heart of software business. Tripartite states should establish regional ICT hubs to support software and ICT human resource development. Through bilateral, multilateral and regional trade forums, the tripartite states should expand efforts to combat software IP infringement. The states should ensure that patents are available for inventions in the software field just as they are available to inventions in any other industry. They should ensure that disputes over standard-essential patents are not litigated in forums where the only available remedies are market-exclusion orders that disrupt the availability of IT products and services for consumers. The tripartite countries should affirm that an open and free Internet cannot exist without robust protection for intellectual property. Individual countries should oppose legislated or regulated technology mandates that dictate government procurement that favour one technology or business model over others.

10. Use of IP Flexibilities

In line with their multilateral obligations, the tripartite countries should make use of flexibilities available in multilateral IP treaties. For the flexibilities to have impact, there is need to conduct cost benefit analysis of implementing IPR polices and determine the social cost of granting IPRs. There is also need to evaluate the current IP protection system vis-à-vis the cost of protection to the innovators. The standard system of patenting is not accessible for many small entrepreneurs and grass-root innovators due to limited resources and their risk averse nature. Within the flexibility regime, the tripartite states should adopt policies that mitigate adverse impacts of IP protection e.g. strengthening competition laws, use of compulsory licences, tougher application of traditional patent principles of novelty and inventive step, tougher application of research or experimental use exemption; limiting the scope of patent claims and broaden the responsibilities of patent holders. National governments may need to think how to establish innovative low cost systems like petty patents/utility models.

11. Creation of Data Bases

There is absence of verifiable and continuous flow of IP data from individual tripartite member states. There is need to establish a data base to have statistics for empirical evaluation of the impact of IPR in the national economy. It is recommended that each subject matter of IP protection should have a data base.

12. Harmonization and approximation

Due to similarity in the multilateral and regional framework for IP protection, it is recommended that the tripartite states should adopt and pursue a policy of harmonization and approximation of their IP laws.

Annex 1: Availability of National Legislation for Specific IP Subject Matter

COUNTRY	PATENTS	UTILITY MODEL	INDUSTRIAL DESIGN	TRADE MARKS	TRADE SECRETS ACT	PLANT BREEDERS RIGHTS	GI	COPYRIGHT	LAYOUT DESIGN (TOPOGRAPHY) OF INTEGRATED CIRCUITS	TRADITIONAL KNOWLEDGE	IP POLICY
ANGOLA	YES	YES	YES	YES	NO	NO	NO	YES	NO	NO	NO
BOTSWANA	YES	YES	YES	YES	NO	NO	YES	YES	NO	YES	NO
BURUNDI	YES	YES	YES	YES	NO	NO	NO	YES	NO	NO	NO
COMOROS	YES	YES	YES	YES	NO	NO	NO	YES	NO	NO	NO
CONGO	YES	YES	YES	YES	NO	NO	YES	YES	NO	NO	NO
DJIBOUTI	YES	YES	YES	YES	NO	NO	NO	YES	NO	NO	NO
EGYPT	YES	YES	YES	YES	YES	YES	YES	YES	YES	NO	NO
ERITREA	YES	YES	YES	YES	NO	NO	NO	YES	NO	NO	NO
ETHIOPIA	YES	YES	YES	YES	NO	YES	NO		NO	YES	NO
KENYA	YES	YES	YES	YES	NO	YES	NO	YES	NO	NO	NO
LESOTHO	YES	YES	YES	YES	NO	NO	NO		NO	NO	NO
LIBYA	YES	YES	YES	YES	NO	NO	NO	YES	NO	NO	NO
MADAGASCAR	YES	YES	YES	YES	NO	NO	NO		NO	NO	NO
MALAWI	YES	YES	YES	YES	NO	YES	NO	YES	NO	NO	NO
MAURITIUS	YES	YES	YES	YES	NO	NO	YES	YES	YES	NO	NO
MOZAMBIQUE	YES	YES	YES	YES	NO	NO	YES		NO	YES (TCE)	YES
NAMIBIA	YES	YES	YES	YES	NO	NO	NO		NO	NO	NO
RWANDA	YES	YES	YES	YES	NO	NO	NO	YES	NO	YES (FOLKLORE)	YES

SEYCHELLES	YES	YES	YES	YES	NO		NO	YES	NO	NO	NO
SOUTH AFRICA	YES	YES	YES	YES	NO	YES	NO	YES	NO	YES	YES
SUDAN	YES	YES	YES	YES	NO		NO		NO	NO	NO
SWAZILAND	YES	YES	YES	YES	NO	YES	NO	YES	NO	NO	NO
UGANDA	YES	YES	YES	YES	YES		NO		NO	NO	NO
UNITED REPUBLIC OF TANZANIA	YES	YES	YES	YES	NO	YES	NO	YES	NO	NO	NO
ZAMBIA	YES	YES	YES	YES	NO	YES	NO	YES	NO	NO	NO
ZIMBABWE	YES	YES	YES	YES	NO	YES	YES	YES	YES	NO	NO
ARIPO	YES	YES	YES	YES	NO	YES	NO	NO	NO	YES	NO

Annex 2: Tripartite Countries Intellectual Property Statistics 2010 (Applications Filed)

COUNTRY	PATENTS	UTILITY MODEL	INDUSTRIAL DESIGN	TRADEMARK	PLANT BREEDERS RIGHTS	GI	COPYRIGHT
ANGOLA	1	-	-	279	-	-	-
BOTSWANA	2		29	1,794	-	-	-
BURUNDI	-	-	-	-	-	-	-
COMOROS	-	-	-	-	-	-	-
CONGO	-	-	-	2	-	-	-
DJIBOUTI	-	-	-	-	-	-	-
EGYPT*	2,230	1	287	9,763	-	-	-
ERITREA	1	-	-	-	-	-	-
ETHIOPIA	1	72	246	719	-	-	-
KENYA	197	13	76	3,743	93		
LESOTHO	-	-	-	1,604	-	-	-
LIBYA	-	-	-		-	-	-
MADAGASCAR	43		286	1772			
MALAWI	-	-	-	-	-	-	-
MAURITIUS	-	-	-	-	-	-	-
MOZAMBIQUE	-	-		2,417	-	-	-
NAMIBIA	-	-	34	2,091	-	-	-
RWANDA	-	-			-	-	-
SEYCHELLES*	59		67	734	-	-	-
SOUTH AFRICA	6,383	7	1,747	30,549	366	-	-
SUDAN	-	-	-	2,399	-	-	-
SWAZILAND	75		1	1,386	-	-	-
UGANDA	-	-	-	-	-	-	-
UNITED REPUBLIC OF TANZANIA	1	-	-	764	-	-	-
ZAMBIA	-	-	-	1,963	-	-	-
ZIMBABWE	-	-	-		-	-	-
ARIPO	448		209		-	-	-
USA	490,226		29,059	377,964	-	-	-
SINGAPORE	9,773		1,926	32,273	-	-	-
KOREA	178,644		69,985	141,167	-	-	-
ISRAEL	10,928		3,807	10,518	-	-	-
JAPAN	468,320		67,388	192,645	-	-	-

**The data is for Madrid Trademark applications. No data exists for National applications.*